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THE
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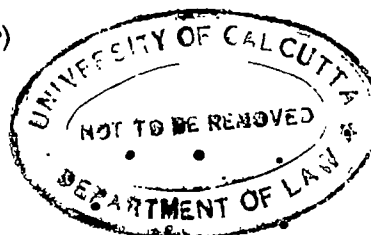
REPORTS OF CASES

DECIDED BY THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL ON APPEALS
FROM INDIA
AND
BY THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

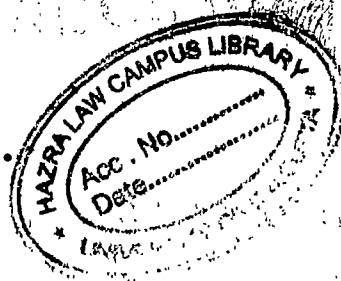
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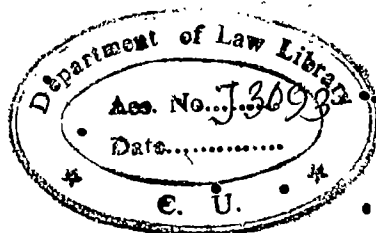


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JUDGES OF THE HIGH COURT.

Chief Justice.

The Hon'ble Sir Lancelot Sanderson, Kt., K.C.

The Hon'ble Sir Nalini Ranjan Chatterjea, Kt. (*Acting Chief Justice*)

Puisne Judges.

The Hon'ble Sir Nalini Ranjan Chatterjea, Kt.

- „ Sir Hugh Walmsley, Kt.
 - „ Sir William Ewart Greaves, Kt.
 - „ Sir Babington Bennett Newbould, Kt.
 - „ Sir George Claus Rankin, Kt.
 - „ C. C. Ghose.
 - „ P. L. Buckland.
 - „ Z. R. Z. Suhrawardy.
 - „ A. H. Cuming.
 - „ H. G. Pearson.
 - „ Bepin Behari Ghose.
 - „ E. B. H. Panton.
 - „ Arthur Page.
 - „ A. J. Chotzner.
 - „ M. N. Mukerji. (*Addl.*)
 - „ Dwarka Nath Chakravarti. (*Addl.*)
 - „ W. G. Gregory. (*Addl.*)
 - „ H. P. Duval. (*Offg.*)
 - „ J. F. Graham. (*Offg.*)
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Advocate General.

- Mr. S. R. Das.
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Standing Counsel.

- Mr. B. L. Mitter.
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Senior Government Pleader.

- Babu Surendra Nath Guha. •

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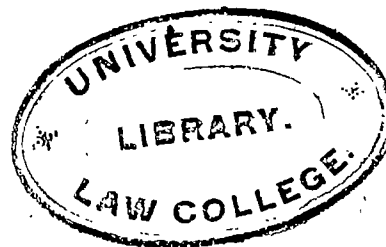


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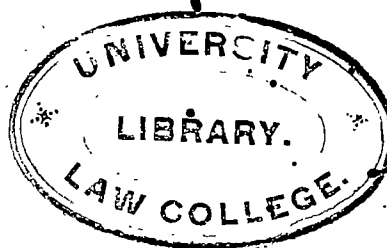
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FULL BENCH.

*Before Sir Hugh Walmsley, Knight, Judge, Mr. Justice C. C.
Ghose, Mr. Justice Suhrawardy, Mr. Justice B. B.
Ghose, and Mr. Justice Duval.*

GORA CHAND HALDAR

v.

PROFULLA KUMAR ROY AND OTHERS.*

CIVIL.

1925.

May, 11, 12.
June, 15.

*Decree, execution of—Decree made without jurisdiction—Executing Court, if
can refuse execution.*

Where the decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction.

Application for execution of decree.

The appellant obtained a mortgage decree in 1920 in the Court of the Subordinate Judge of Birbhum in respect of properties, some of which were in the district of Birbhum and some in the Santhal Parganahs. He then applied for execution. The judgment-debtors objected that the decree being passed without jurisdiction, was incapable of execution. The primary Court gave effect to this objection. On appeal by the decree-holder, Suhrawardy and Cuming JJ. made the following reference to Full Bench.

Reference.

This appeal is directed against an order of the Subordinate Judge of Birbhum holding the decrees sought to be executed by the *Full Bench Reference No. 5 of 1924 in Appeal from Order No. 365 of 1923, against the order of the Subordinate Judge of Birbhum, dated the 14th June, 1922.

1924.

December, 15.

CIVIL.

1925.

Gora Chand

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Profulla.

appellant incapable of execution and dismissing his application for execution. In 1910 appellant obtained the mortgage decree, which he is now seeking to execute, in the Court of the Subordinate Judge of Birbhum in respect of properties some of which were in the district of Birbhum and some in the Santhal Parganahs. In this execution case the judgment-debtors have taken exception to the execution on the ground that when the decree was passed some of the mortgaged properties situated in the Santhal Parganahs were under settlement and so under section 2 of Act 37 of 1855 the Birbhum Court had no jurisdiction to pass the decree; the decree having thus been passed without jurisdiction is void and incapable of execution. The Court below has found that one of the Santhal Parganas properties, Mouzah Moulati, was under settlement when the decree was passed and held under the provisions of the Act above referred to and on the authority of the decision of the Judicial Committee of the Privy Council in *Maha Prasad Singh v. Ramani Mohan Singh* (1) that the Birbhum Court had no jurisdiction to try the suit and pass the decree which is accordingly void and incapable of execution. In this view the learned Subordinate Judge has dismissed the execution case. The finding of fact recorded by the Court below has not been disputed before us by the appellant but the order of the Court below has been assailed on two grounds: (1) that the Court below as executing Court could not go behind the decree and test its validity but was bound to execute it even though it was passed without jurisdiction; (2) that the Court below is wrong in holding that the whole decree was bad and it should have executed so much of it as was valid in respect of the Birbhum properties.

The second contention may be shortly disposed of as untenable in view of the decision of the Judicial Committee in *Maha Prasad Singh v. Ramani Mohan Singh* (1).

On the first point there is no unanimity of opinion and we find it difficult to reconcile some of the decisions of this Court. In *Roop Narain Singh v. Ramayee Singh* (2) and *Narendra Bahadur v. Gopal Sah* (3), the objection that the decree was void and incapable of execution was permitted to be raised and allowed in the execution of the decree. A contrary view was taken in *Biswa Nath Prasad Mahata v. Bhagwanlin Pandey* (4), and in *Kali*

(1) (1914) 1 L. R. 42 Calc. 116; 20 C. L. J. 231.

(2) (1878) 3 C. L. R. 192.

(3) (1912) 17 C. L. J. 634.

(4) (1911) 14 C. L. J. 648.

Pada Sarkar v. Hari Mohan Dalal (1) where it has been laid down that an execution Court cannot question validity of the decree and refuse execution though the decree was a nullity and passed without jurisdiction. In *Kunja Mohan Chakravarti v. Manindra Chandra Rai Choudhury* (2), Mookerjee, J. who was a party to the decisions in 14 C. L. J. 648 and I. L. R. 44 Calc. 620 enunciates the proposition of law that when a decree is void and a nullity it is not only the duty of the Court which passed it to ignore it but of every Court to which it is presented. Though the case in which this observation was made did not arise in execution it is wide enough to cover a case like the present and is in conflict with the view expressed by the same learned Judge in the two previous cases above cited. This question has been recently considered by a Full Bench of the Patna High Court in *Jungli Lal v. Laddu Ram* (3) where on a review of the conflicting authorities it has been held that an execution Court can only execute a valid decree and a void decree ought to be disregarded without any formal proceedings to set it aside. The same view has been taken in other High Courts: *Imdad Ali v. Jagan Lal* (4); *Haji Musa v. Purmanand* (5); *M. Subramania v. Vaithinatha* (6).

As it is a matter of general importance and the view taken by this Court in the cases in 14 C. L. J. and I. L. R. 44 Calc. are not only in conflict with that accepted by the other High Courts but also with the decisions in other cases of this Court to which we have referred, we are of opinion that the present state of the authorities being embarrassing to the lower Courts the law on the point should be settled by a Full Bench.

We accordingly submit the following question for the decision of the Full Bench:—

Where a decree having been passed by a Court having no jurisdiction to pass it, is void, and a nullity, is the execution Court competent to question its validity and refuse to execute it? As the point has arisen in a second appeal the whole case is submitted to the Full Bench for decision.

Babus Rupendra Coomar Mitter and Dharmo Das Sett (for *Babu Pramatha Nath Bandopadhyaya*) for the Appellant.

(1) (1916) I. L. R. 44 Calc. 627; 24 C. L. J. 375.

(2) (1922) 27 C. W. N. 542.

(4) (1895) I. L. R. 17 Adl. 478.

(6) (1913) I. L. R. 38 Mad. 682.

(3) (1919) 4 Pat. L. J. 240.

(5) (1890) I. L. R. 15 Bqm. 216.

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June, 15.

Babu Baranashibashi Mookerjee (for Babu Brojo Lal Chakravarti) and Panchanan Ghosal for the Respondents.

C.A. V.

The following judgments were delivered :

Walmsley J.—This reference is made in a first appeal from an order. The necessary facts are given in the order of reference, and need not be repeated.

The question propounded is in these words "Where a decree, having been passed by a Court having no jurisdiction to pass it; is void, and a nullity, is the execution Court competent to question its validity and refuse to execute it?"

The learned Judges who made the reference are satisfied that the decree under consideration was made by a Court that had no jurisdiction to make it, and that in consequence it is void and a nullity. It is not open to us therefore to consider any of the questions involved in that finding. We have to start by accepting the proposition that the Court that made the decree had no jurisdiction to make it, and by that expression is meant that the Court had not such territorial jurisdiction as would authorize it to make the decree, and not that having jurisdiction it exercised it erroneously. This distinction is of great importance for with all respect I venture to think that the apparent conflict in reported cases is largely due to failure to keep this distinction clearly in view. It would be tedious to examine the numerous decisions in detail, and it would not lead to any useful result. I think it may be said that the correct view, and the view for which there is a strong current of authority, is that where the decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Within these narrow limits I think that the executing Court is authorized to question the validity of a decree.

As the question arises in a first appeal, we must return the case for final adjudication by the Bench which referred it, with the statement that our answer to the question propounded is in the affirmative.

C. C. Ghose J.—I agree.

Suhrawardy J.—I agree.

B. B. Ghose J.—I agree.

Duval J.—I agree.

A. T. M.

Reference answered in the affirmative.

Before Sir Hugh Walmsley, Knight, Judge, Sir William Ewart Greaves, Knight, Judge, Mr. Justice C. C. Ghose, Mr. Justice B. B. Ghose and Mr. Justice Mukerji.

REFERENCE UNDER SECTION 113 READ WITH
ORDER XLVI R. 1 C. P. C.*

Court-fee—Stamp—Court-Fees Act (VIII of 1870), Sch. II. Art. 6—Stamp Act (II of 1899), Sch. I. Arts. 15, 40, 57—Security bond by next friend of minor—Decree, execution of—Civil Procedure Code (Act V of 1908), O. 32 R. 6 (2).

CIVIL.

1925.
May, 4.
June, 20.

A security bond executed in pursuance of an order of the Court passed under order 32 rule 6 sub-rule (2) or any other rule or section of the Code of Civil Procedure, shall bear a court-fee stamp as required by article 6 schedule II of the Court-Fees Act; they will also be chargeable under the Stamp Act, if they are of the kind described in article 40 or article 57, schedule I of the Act, but will not be chargeable under the Stamp Act if they fall under the residuary article 15, schedule I of the Act: *Dwarkanath v. Sailaja* (1) over-ruled.

Reference under section 113 read with order 46 rule 1 of the Code of Civil Procedure.

The material facts appear from the following Reference by Greaves and Chakravarty JJ.

Reference.

The Munsif of the 4th Court, Habiganj, District Sylhet, has under the provisions of the above section and order, referred to the Court the question whether a security bond executed under the order of the Court passed under O. 32 r. 6 (2) or under any other section or rule of the Civil Procedure Code should be stamped under the Court-fees Act or under the Stamp Act.

1924.
December, 16,

Holmwood and Teunon JJ. held in the case of *Dwarkanath Dey v. Sailaja Kanta Mullik* (1), the security bonds given in pursuance of an order of the Court for stay of execution should be stamped under the Stamp Act. Newbould and Panton JJ. have recently held in *Sarbo Musulmani v. Safar Mandal* (2) that a security bond executed by a person for the release of attached animals should be stamped under Art. 6, Sch. II of the Court-Fees Act.

*Full Bench Reference No 4 of 1924 made by Greaves and Chakravarty JJ. dated the 15th December 1924 in Reference No. 7 of 1924 by Munsiff, 4th Court, Habiganj.

(1) (1916) 21 C. W. N. 1150.

(2) (1922) 1 L. R. 49 Cal. 997.

CIVIL.

1925.

Reference.

It would therefore appear that there is a conflict between the decisions of two Division Benches of this Court on the question which arises on this reference.

Under the circumstances we refer for the decision of a Full Bench of the Court the question whether a security bond executed under the order of the Court passed under O. 32 r. 6 (2) or under any other order or section of the Code of Civil Procedure should be stamped under the Court-fees Act or under the Stamp Act.

There was no appearance before us on the reference.

Babu Surendra Nath Guha (Senior Government Pleader) for the Government.

C. A. V.

The judgments of the Court were as follows :

June, 29.

Walmsley J :—The circumstances which have given rise to this reference are as follows. In an execution case at Habiganj, the next friend of a minor decree-holder was directed to furnish security under order XXXII rule 6 (2) of the Civil Procedure Code before receiving certain money on behalf of the minor. He filed a security bond, and then a question arose as to whether the bond was to be stamped under the Court Fees Act, or under the stamp Act. The learned Munsif found that there were two conflicting decisions on the point viz. the case of *Dwarkanath Dey v. Sailaja Kanta Mallik* (1) and that of *Sarbo Musalmani v. Safar Mandal* (2), and he referred the question to this Court under the provisions of order XLVI. rule 1 of the Civil Procedure Code.

A Division Bench finding the two decisions to be directly opposed to one another has referred for the decision of a Full Bench the question whether a security bond executed under the order of the Court passed under order XXXII Rule 6 (2) or under any other order or section of the Civil Procedure Code should be stamped under the Court-Fees Act or under the Stamp Act.

The learned Government Pleader has appeared before us, and has suggested that our answer should be to this effect, that such security bonds should be stamped under article 6 schedule II of the Court-Fees Act unless they are of such a nature as to attract the operation of article 40 or article 57 of the Stamp Act.

Article 6 of schedule II of the Court Fees Act now runs :
" Bail bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of

(1) (1916) 21 C. W. N. 1150.

(2) (1922) 1. L. R. 49 Calc. 997.

the Code of Criminal Procedure or the Code of Civil Procedure."

I feel no hesitation in holding that a security bond of the kind mentioned in the Munsif's letter comes within this description. With all deference to the learned Judges who decided the case of *Dwarkanath Dey v. Sailaja Kanta Mullik* (1). I think they placed too narrow a meaning on the words "in pursuance of." Compliance with a condition imposed by a Court is, in any opinion, an act done in pursuance of the Court's order : and I think that the narrow construction proposed in the judgment mentioned would render article 6 nugatory.

It does not follow however that because a security bond falls within the scope of article 6 schedule II of the Court-Fees Act, it is free from the provisions of the Stamp Act. This Act contains a clause—section 2 (5) which enumerates three kinds of instruments which are to be regarded as bonds. Then in schedule I there are three articles which have a bearing on the question before us, viz. articles 15, 40 and 57. They are as follows :

Article 15. Bond [as defined by section 2 (5)] not being a Debenture [No. 27] and not being otherwise provided for by this Act, or by the Court-Fees Act, 1870.

Article 40. Mortgage deed, not being an agreement relating to deposit of title deeds, Pawn or Pledge (No. 6), Bottomry Bond. (No. 16), Mortgage of a Crop (No. 41), Respondentia Bond (No. 56) or Security Bond (No. 57)

Article 57. Security Bond or Mortgage deed executed by way of security for the due execution of an office or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract.

A comparison of these articles shows that article 15 is of a residuary character, intended for bonds which cannot be assigned to any other of the articles of the Stamp Act and are not provided for by the Court-Fees Act. It is the only article in which reference is made to the Court-Fees Act. It follows therefore that a bond which finds its proper place in one or the other Articles is not exempt from duty under the Stamp Act, and, at the same time, as being given in pursuance of the Court's order, it is liable under article 6 of schedule II of the Court-Fees Act.

The answer that I propose to the reference is that security bonds executed in pursuance of an order of the Court under order XXXII. Rule 6 (2) or any other rule or section of the Civil Procedure Code must bear a court-fee stamp as required by article 6 of

(1) (1916) 21 C. W. N. 1150.

CIVIL.

1925.

Reference.

Walmsley, J.

CIVIL.

1925.

Reference:

Walmsley, J.

schedule II of the Court-Fees Act, 1870: and they will also be chargeable under the Stamp Act if they are of the kind described in article 40 or article 57, but they will not be chargeable under the Stamp Act if they fall under the residuary article 15.

Greaves J:—I agree

C. C. Ghose J:—I agree.

B. B. Ghose J:—I agree.

Mukerji J:—I agree.

A. T. M.

Reference answered.

PRIVY COUNCIL.

PRESENT.—*Lord Sumner, Lord Blanesburgh, Sir John Edge
Mr. Ameer Ali, and Lord Salvesen.*

SURA LAKSHMIAH CHETTY AND OTHERS

v.

KOTHANDARAMA PILLAI.

P. C.

1925.

April, 28, 30.
May, 22.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Hindu Law—Purchase of property by husband in name of wife—Ante-nuptial agreement, or benami transaction—Burden of proof.

A purchase by an Indian husband of property in India in the name of his wife, unless otherwise explained, is presumed to be a *benami* transaction, by which the beneficial interest in the property is in the husband, and the ostensible title in the wife.

The rule of English law, that such a purchase is assumed to be for the advancement of the wife, does not apply in India: *Gopeekrist v. Gungapersaud* (1); *Moulvie Sayyud Ushur Ali v. Myssumut Bebee Ultaf Fatima* (2); *Bilas Kunwar v. Desraj Ranjit Singh* (3); *Ram Narain v. Muhammad Hadi* (4) referred to:

The burden of proof is on the person who alleges that the property was purchased in pursuance of an antenuptial agreement.

(1) (1854) 6 M. I. A. 53.

(2) (1869) 13 M. I. A. 232; 13 W. R. P. C. 1; 4 B. L. R. P. C. 1.

(3) (1915) L. R. 42 I. A. 202; 1 L. R. 37 All. 557; 22 C. L. J. 516.

(4) (1898) L. R. 26 I. A. 38; 1 L. R. 26 Calc. 227.

It would be unwise of a Judge to act in a disputed Indian case upon oral evidence that there had been an antenuptial agreement, which would in effect be marriage settlement, unless there was contemporaneous written evidence to corroborate the oral evidence.

Appeal from a decree of the High Court (15th August 1922) (Schwabbe, C. J. and Wallace, J.), reversing a decree of the same Court in its original jurisdiction (31st August, 1921—Phillips, J.)

Appeal by the Defendants.

The facts sufficiently appear from the judgment of their Lordships.

L. de Gruyther K. C. and *E. B. Raikes* for the Appellants.

K. V. L. Narasimham for the Respondent.

The judgment of the Board was delivered by

Sir John Edge : This is an appeal from a decree, dated the 15th August, 1922, of the High Court of Madras, which reversed a decree, dated the 31st August, 1921, of the same Court made in its Ordinary Original Civil Jurisdiction, which had dismissed the suit.

The suit in which this appeal has arisen was brought in the High Court of Madras on the 19th November, 1918, by the plaintiff, a minor, by his next friend, against the Official Assignee of Madras and three moneylenders. One of the moneylenders died, and his legal representative was brought on the record as a defendant. The plaintiff is the respondent in this appeal.

The plaintiff is the son of V. S. Chockalingam Pillai, a Hindu of the Villala caste, by his wife, Lakshmi Ammal, who died before the suit was brought. The plaintiff is the sole heir of his late mother, and he claims the property to which the suit relates as her heir. On the 30th September, 1918, the plaintiff's father, Chockalingam, was adjudged insolvent by the High Court of Madras under the Presidency-Towns Insolvency Act, 1909, Act III of 1909. The plaintiff claims in his suit, with other reliefs, a declaration that a piece of land with a dwelling-house and buildings thereon, being Nos. 4 and 5, Nainiappa Naick Street, are his exclusive property as the heir of his mother, and that his father, Chockalingam, had no beneficial or other interest in those properties, which could have vested in the Official Assignee or have been assigned by him in mortgage. 4 and 5, Nainiappa Naick Street will, in this judgment be referred to as the property in question.

The land and buildings then thereon were purchased by Chockalingam on the 12th May, 1909, and by the sale-deed were conveyed

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Sir John Edge.

by the vendors to Lakshmi, who had been married to Chockalingam some years previously. The question upon the answer to which this suit depends is whether Chockalingam had purchased that property in 1909 for his wife Lakshmi in performance of an antenuptial agreement alleged to have been made by him to settle a house upon her, or whether the purchase was made in her name as benamidar for Chockalingam. There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a benami transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India. See *Gopeekrist v. Gungapersaud* (1); *Moulvie Sayyud Uzhur Ali v. Mussumat Bebee Ulfat Fatima* (2), and *Bilas Kunwar v. Desraj Ranjit Singh* (3). If the plaintiff failed to prove that antenuptial agreement and that it was in performance of it that the property in question was purchased by Chockalingam in Lakshmi's name, his suit fails.

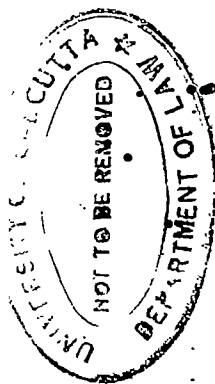
Chockalingam has not been called by either side to give evidence in the suit, and his absence from the witness box has not been satisfactorily explained.

The facts, so far as they can be ascertained by their Lordships from the record, are as follows—Chockalingam and Vinayatheertha Pillai, who died in 1898 or in 1899, were trading as peamerchants in partnership at 6, Mint Street, in Madras. When that partnership commenced their Lordships do not know. It does not appear what the interest of the partners respectively was in the house, 6, Mint Street, or in the partnership. But 6, Mint Street was the property of the partnership. Vinayatheertha left surviving him two young children, a son Vadivelu, who was living when the witnesses were giving their evidence in the suit, and a daughter Lakshmi, and his mother Kathayee, who gave evidence in this suit. After Vinayatheertha died his mother Kathayee carried on the family business in partnership with Chockalingam at 6, Mint Street, and Kathayee and the two young children of Vinayatheertha continued to live in that house together with Chockalingam. Chockalingam married Lakshmi, according to the plaint in or about 1907, or, according to the evidence of witnesses who were relations of Lakshmi, in 1909.

(1) (1854) 6 M. I. A. 53.

(2) (1869) 13 M. I. A. 232.

(3) (1915) L. R. 42 I. A. 202.



LP 1849.

At the time of the marriage Chockalingam had two wives living, one of whom was living with him, and he also had a son living. According to the evidence of Kathayee and two relations of Lakshmi, if it may be credited, when Chockalingam asked for Lakshmi, in marriage, Kathayee, acting on the advice of relations, said to him that she would give him Lakshmi in marriage if he would make a provision for her, but not otherwise, and asked him what provision he would make for Lakshmi, and he said that, if the Mint Street house were sold, another house might be purchased and be given to Lakshmi. Thereupon she, Kathayee, gave Lakshmi to Chockalingam in marriage. That was the antenuptial agreement which is alleged by the plaintiff to have been made. A railway company was negotiating for the purchase of the Mint Street house, and purchased it for the price of Rs. 10,315.8 from Chockalingam and Kathayee, and paid the price to them. It is to be presumed that the money then paid by the railway company to Kathayee was, or part of it was, received by her for and on behalf of her grandson Vadivelu, who does not appear to have had any other person to look after his interests.

In 1904 Chockalingam had purchased, apparently with his own money, houses 12 and 13, Memorial Hall Street, in Madras, and he, in 1909, mortgaged those houses for Rs. 9,000, and their Lordships consider it probable that Chockalingam, on the 12th May, 1909, had other property apart from his interest in the pea dealing partnership and in the Mint Street house, and there is no reason shown why all the purchase money of the property in question was not Chockalingam's own money. Certainly none of it is shown to have been Lakshmi's.

Mr. Justice Phillips, who tried the suit, did not believe the evidence that there had been an antenuptial agreement, and he found that the purchase of the property in question on the 12th May, 1909, in the name of Lakshmi was a benami transaction and that she was merely benamidar for her husband Chockalingam. Mr. Justice Phillips in his judgment made a statement with which their Lordships agree. He said :—

"We do not know what really happened to Vinayatheertha's property when he died or what share he had in the business, or whether really he did leave any property which was undisposed of at the date of Lakshmi's marriage. There is no evidence about these facts on either side though the plaintiff's family ought to know all that can be known about this."

It will be remembered that Vinayatheertha had died in 1898

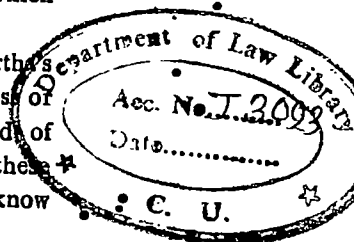
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or in 1899, and the property in question was purchased in May, 1909. Mr. Justice Phillips rightly found as to the money which was invested in the purchase of the property in question that if the purchase money did not belong to Chockalingam it did not belong to Lakshmi, but belonged to her brother Vadivelu. Mr. Justice Phillips by his decree dismissed the suit. From that decree the plaintiff appealed under the Letters Patent.

The appeal under the Letters Patent was heard by Sir W. S. Schwabe, C.J., and Mr. Justice Wallace. The Chief Justice stated in his judgment :—

that "the question to be decided is whether a purchase of property by one Chockalingam, an insolvent, in the name of his wife, Lakshmi, was a settlement on her on her marriage or was a benami transaction, she being benamidar for him. The evidence called was all one way, namely, that the property was purchased out of funds belonging $\frac{1}{11}$ (six-elevenths) to Chockalingam and $\frac{5}{11}$ (five-elevenths) to Lakshmi's infant brother Vadivelu, as the heir to his father, formerly a partner of Chockalingam."

If there was such evidence as to the respective shares of Chockalingam and Vadivelu, the attention of their Lordships has not been drawn to it, and if there had been such evidence it would not show that Lakshmi had acquired a beneficial title to the property. Vadivelu was a minor on the 12th May, 1909, and could not make a present of his property to his sister, Lakshmi. Mr. Justice Wallace agreed with the judgment of the Chief Justice.

They accepted the evidence that the alleged antenuptial agreement had been made and gave the plaintiff the decree which he claimed. From their decree this appeal has been brought.

It would, no doubt, have been prudent on the part of Kathayee and Lakshmi's relations to have insisted before Lakshmi was given in marriage to Chockalingam, who was an old man with two wives and a son living, that he should agree to settle some property on her. It is obvious to their Lordships that Lakshmi had no property of her own. She was not the heir to any property and could have had no expectations of succeeding to any property. Possibly, Chockalingam may have been asked to promise to make a settlement on Lakshmi, but the question is: Did he agree to do so? It appears to their Lordships that most probably the story of this alleged agreement to make a settlement was first thought of after Chockalingam's insolvency in order to save for the plaintiff some part of the property of the insolvent. The property in question was purchased in May, 1909, and Lakshmi lived until 1912 and if

Chockalingam had agreed to settle the property in question there was plenty of time in which he could have executed a proper deed of settlement upon her.

In their Lordships' opinion it would be unwise to accept as proved such an oral agreement as is alleged on the part of the plaintiff except on the clearest and most satisfactory evidence of credible witnesses, and after giving the most careful consideration to the evidence in this suit their Lordships agree with Mr. Justice Phillips and find that Chockalingam did not agree to make any settlement upon Lakshmi and that she had no beneficial interest in the property in question and was a mere benamidar for Chockalingam.

If it were necessary in this case to ascertain by evidence whether her position was that of a beneficial owner of the property in question and not that of a mere benamidar for Chockalingam, the transaction which will now be referred to would be material evidence. See *Pandit Ram Narain v. Maulvi Muhammad Hadi* (1) and the cases already cited. The property in question was purchased on the 12th May, 1909. On the 25th July, 1909 Chockalingam and Lakshmi jointly gave what was apparently treated as an equitable mortgage to S. Krishnaswami Ayyangar of the property which had been purchased on the 12th May, 1909, in her name, which they stated was "in our possession and enjoyment." On the 30th March, 1910, Chockalingam and Lakshmi jointly granted a lease of the property in question to Sirakalai Pillai. On the 4th December, 1912, Lakshmi died. On the 18th March, 1914, Chockalingam on his representation that he "is in possession of and is entitled to" the property in question obtained in the Registration Department the Collector's certificate. On the 21st February, 1918, Chockalingam mortgaged the property in question to C. Vythialingam Pillai and in the deed of mortgage it was stated that he had purchased the property in question out of his own self-acquired earnings and was absolutely entitled to it. As to these transactions by Chockalingam after the 12th May, 1909, it is only fair to the plaintiff to bear in mind that his mother was, until she died, under the influence of her husband Chockalingam, and seems to have had no independent advice, and that the plaintiff was a minor of tender years without anyone, except his great grandmother, an aged woman, to protect the interest, if any, which he may have had. But those transactions show how Chockalingam dealt with the property in question.

(1) (1898) L. R. 26 I. A. 38.

P. C.

1925.

Sura Lakshmiah

v.
Kothandarama.

Sir John Edge.

P. C.

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Their Lordships do not decide that an antenuptial agreement may not be orally proved in an Indian case, but they consider that it would be unwise of a Judge to act in a disputed Indian case upon oral evidence that there had been an antenuptial agreement which would in effect be a marriage settlement, unless there was contemporaneous written evidence to corroborate the oral evidence. In this case there was no such evidence.

Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs and the decree appealed against should be set aside with costs and the decree of Mr. Justice Phillips be restored.

Josselyn & Elwes : Solicitors for Appellants.

H. S. L. Polak : Solicitor for Respondent.

A. de. M.

Appeal allowed.

APPELLATE CIVIL.

*Before Sir Asutosh Mookerjee, Knight, Judge, and
Mr. Justice Rankin.*

SWARNAMOYI AND ANOTHER

v.

SOURINDRA NATH MITRA AND OTHERS.*

CIVIL.

1923.

April, 9.

Ejectment—Evidence Act (IX of 1872), Sec. 90—Ancient document—Presumption, when arises—Roadcess returns—Admissibility in evidence—Adverse possession of limited interest.

A document which purports to be an ancient document should be corroborated by some evidence ; if this is done, presumption may be made in its favour under section 90 of the Evidence Act.

Mere production of an ancient document, unless supported by some corroborative evidence of acting under it, is not entitled to any weight. An ancient deed must be corroborated by evidence of ancient or modern corresponding enjoyment or by other equivalent or explanatory proof ; it is then presumed to have constituted part of the actual transfer of property mentioned, because this is the

* Appeal from Original Decree No. 109 of 1920, against the decree of Babu Narendra Nath Lahiri, Subordinate Judge, 1st Court, of Backerganj, dated the 28th February, 1920.

usual course of such transactions : in brief, though absence of proof of possession does not affect its admissibility, it affects the weight to be attached to the document : *Doe v. Pulman* (1) and other cases referred to : *John King & Co. v. Chairman of Municipal Corporation* (2) distinguished.

Roadcess returns are admissible only against the maker : *Chalho v. Phaze* (3) and other cases.

Possession of a limited interest, for instance, the claim to an intermediate tenure, may be just as much adverse as is adverse possession of a complete interest in the property; consequently such possession of a limited interest may be just as much adverse for the purpose of barring suit for the determination of that limited interest as adverse possession of a complete interest in the property operates to bar a suit for the whole property. Such adverse possession of a limited interest, however, though a good plea to a suit for ejectment is good only to the extent of that interest.

Appeal by Defendants Nos. 4 and 5 and Cross-objection by the Plaintiff.

Suit for possession of land and mesne profits, and, in the alternative, for assessment of rent.

Babus Rames Chandra Sen and *Jitendra Kumar Sen Gupta* for the Appellants.

Babus Jogesh Chandra Roy, Mohendra Nath Ray and *Nanda Gopal Banerji* for the Respondents.

The judgment of the Court was delivered by

Mookerjee J : This is an appeal by the defendants in a suit for possession of land and mesne profits, and, in the alternative, for assessment of rent. The defendants resisted the claim on a three-fold ground, namely, first, that the lands were comprised in a tenancy created in favour of their predecessor on the 24th January, 1856 ; secondly, that the plaintiffs have kept them out of possession from a substantial tract of land comprised in the tenancy, with the result that the rent has been completely suspended ; and thirdly, that they were entitled to abatement of rent on account of diluvion. The Subordinate Judge has dismissed the claim for ejectment, overruled the plea of complete suspension of rent and decreed the rent at Rs. 912 a year for the period between the Pous instalment of 1319 and the Assin instalment of 1322.

The title of the defendants rests upon an Amalnama alleged to have been executed in favour of one Dulal Mridha by Golaknath

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(1) (1842) 3 Q. B. 622 ; 61 R. R. 335.

(2) (1920) 20 C. L. J. 407 ; 18 C. W. N. 898.

(3) (1911) I.L. R. 39 Calc. 995.

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Ghose on the 24th January, 1856. Before we deal with the question of genuineness of this document, it is necessary to refer briefly to two previous litigations between the parties. On the 12th April, 1907, the plaintiffs instituted a suit against the defendants for recovery of possession. The defendants set up the Amalnama just mentioned. The document was not regarded as genuine by the trial Court which decreed the suit on the 8th January, 1908. The defendants appealed to this Court, and after an order of remand for further enquiry, the appeal was finally heard on the 10th August, 1915 when a Division Bench allowed the plaintiffs to withdraw from the suit with liberty reserved to institute a fresh suit only in respect of a portion of the subject matter in controversy. The judgment of this Court has found its way into the reports, *Akimannessa v. Bepin Behari Mitter* (1). During the pendency of the appeal in this Court, on the 24th April 1911, the defendants instituted a suit against the present plaintiff for recovery of possession of a large tract of land. The Amalnama of the 24th January, 1856 was again produced in evidence and met with the same treatment as in the previous litigation. The trial Court dismissed the suit on the 18th March 1912. An appeal was preferred to this Court but was unsuccessful. The decree of the primary Court was affirmed on the 5th July, 1916, on the ground that the plaintiffs had not established that they had a subsisting title to the lands in dispute. During the pendency of the appeal to this Court, the present suit was instituted on the 10th November 1915; as already stated the trial Court has given the plaintiffs a decree on the 28th February 1920.

In the present case, the decision rests primarily upon the solution of the question whether the *amalnama*, which has again been produced in evidence, is or is not a genuine document. The Subordinate Judge has come to the conclusion that its genuineness had not been established. The appellants have contended that the Subordinate Judge has not proceeded in accordance with section 90 of the Indian Evidence Act. That section provides that "Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the hand writing of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to be executed and attested."

(1) (1915) 22 C. L. J. 397.

The appellants have urged that it was open to the Subordinate Judge to presume that the document was executed by the person by whom it purports to have been executed seeing that it purports to be more than 30 years old and was produced from custody which was unquestionably proper. Their grievance is that it was not till the judgment was delivered that they discovered that the Court was not prepared to consider the document to be genuine under section 90 of the Indian Evidence Act. In this connection reference has been made to the decision in *Ramuvien v. Veerappudayan* (1), where the language of section 90 was interpreted and the practice to be followed in cases of this description explained. We are of opinion, however, that the defendants have not really been prejudiced by the course which was adopted by the Subordinate Judge. There is nothing to indicate that they had evidence at their disposal which would have enabled to establish the execution of the document. At this distance of time it is improbable that direct evidence should be forthcoming of the actual execution of the document. The Subordinate Judge on the other hand, has given weighty reasons why the document should not be regarded as genuine. The document first saw the light on the 23rd July, 1907 when it was produced in the first of the two litigations already mentioned; and though the existence of a tenure is mentioned in a conveyance dated the 16th September, 1873 this document is not mentioned by date. Indeed, from the description given in the conveyance it is not possible to identify the tenure mentioned with that alleged to have been created by this document of the 24th January 1856. Apart from this, we have the important fact that there is no proof of possession in accordance with the *amalnama*. It is well settled that mere production of an ancient document, unless supported by some corroborative evidence of acting under it, is not entitled to any weight. An ancient deed must be corroborated by evidence of ancient or modern corresponding enjoyment or by other equivalent or explanatory proof; it is then presumed to have constituted part of the actual transfer of property mentioned, because this is the usual course of such transactions; in brief, though absence of proof of possession does not affect its admissibility, it undoubtedly affects the weight to be attached to the document. In this connection, reference may be made to the case of *Doe on the demise of Earl of Egremont v. Pulman* (2); and the judgment of the Judicial Committee in the case of *Radhamoni*

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(1) (1912) 1 L. R. 37 Mad. 455.

(2) (1842) 3 Q. B. 622; 61 R. R. 335.

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Dabi v. The Collector of Khulna (1). The decision of the Judicial Committee in *John King & Co. v. Chairman of Municipal Commissioners, Howrah* (2), is clearly distinguishable; there the original title deeds were not forthcoming; here the deed has been produced and disbelieved. It is of great importance that a document, which purports to be an ancient document should be corroborated by some evidence; if this is done, presumption may be made in its favour under section 90 of the Indian Evidence Act. We are consequently not prepared to treat the *amalnama* as proved beyond dispute. We may add that we do not lay stress upon the circumstances that it was produced in two previous litigations and on each occasion was treated as suspicious. In favour of the defendants, this may be said that the first litigation had to be withdrawn by the plaintiffs, while in the second litigation the ultimate decision was rested upon the question of limitation. There was consequently no final adjudication as to the genuineness or otherwise of this document in either of the two suits. Nor need we emphasise the omission of mention of the tenure in road cess returns which could be admissible only against the maker: *Chalho v. Jharo* (3); *Sewdeo v. Ajodhya* (4); *Lachmi Prosad v. Jag Mohan* (5). But on the evidence adduced in this litigation, and in view of all the circumstances mentioned, we are not prepared to accept the document as genuine. This disposes of the first question, namely, whether the grant alleged by the defendants is established by the *amalnama* produced by them.

We have next to consider, whether the alleged grant may be inferred from the recitals in documents of subsequent dates, which are undoubtedly genuine. Amongst such documents our attention has been invited to the conveyance of the 16th September 1873, the Osat Howla granted by the fourth and fifth defendants to Someraddi and Imamuddi on the 31st August 1886, another Osat Howlah granted by those defendants to Dulal Mridha on the 30th September, 1896, the Mirash ijara granted by Dulal Mridha to Komaruddi, on the 6th February 1897, the mortgage by Dulal Mridha in favour of Akram Ali on the 9th February 1897, the sale certificate of an execution sale of the interest of Dulal Mridha when Abdul Somed became purchaser on the 6th December, 1889,

(1) (1900) I. L. R. 27 Calc. 943 (949); L. R. 27 I. A. 136.

(2) (1914) 20 C. L. J. 407; 18 C. W. N. 898.

(3) (1911) I. L. R. 39 Calc. 995.

(4) (1912) 15 L. R. 39 Calc. 1005.

(5) (1913) 18 C. L. J. 633.

and finally, the plaint in the suit for rent instituted on the 15th April, 1909 by the second defendant and the heirs of Abdul Somed (defendants Nos. 3 to 3 Kha) against Kamaruddi and others. No doubt, these documents contain recitals of the existence of a tenure. But, as pointed out by the Subordinate Judge, they do not recite the existence of the tenure alleged to have been created by the document of the 24th January, 1856. Under the circumstances the Subordinate Judge was, in our opinion, perfectly justified in declining to infer the existence of this document on the basis of the recitals contained in the documents mentioned.

The next question which requires considering is, whether the defendants have acquired the status of a tenure-holder by adverse possession. This question had been decided in favour of the defendants by the Subordinate Judge. The principle applicable in such a case was explained by this Court in *Ishan Chandra Mitter v. Raja Ramranjan Chakrabutty* (1). Possession of a limited interest, for instance, the claim to an intermediate tenure, may be just as much adverse as is adverse possession of a complete interest in the property; consequently such possession of a limited interest may be just as much adverse for the purpose of barring a suit for the determination of that limited interest as adverse possession of a complete interest in the property operates to bar a suit for the whole property. Such adverse possession of a limited interest, however, though a good plea to a suit for ejectment is good only to the extent of that interest. The same principle has been recognised and applied in a long series of cases: *Bagdu Majhi v. Raja Sri Sri Durga Prosad Singha* (2); *Madhava v. Narayana* (3); *Sankaran v. Periasami* (4); *Seshamma v. Chickaya* (5); *Maidin v. Nagapa* (6); *Budesab v. Hanman-ta* (7); *Yamunabai v. Dhondi* (8); *Subbayya v. Madduletiak* (9); *Parameswaram Mumbannoo v. Krishnan Tengal* (10) and *Sontayana Gopala Dasu v. Inapatalupala Rami* (11). There can be no room for

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(1) (1905) 2 C. L. J. 125 (136).

(2) (1904) 9 C. W. N. 292.

(3) (1885) I. L. R. 9 Mad. 244.

(4) (1890) I. L. R. 13 Mad. 467.

(5) (1902) I. L. R. 25 Mad. 507.

(6) (1882) I. L. R. 7 Bom. 96.

(7) (1896) I. L. R. 21 Bom. 509.

(8) (1903) 5 Bom. L. R. 186.

(9) (1907) 17 M. L. J. 469.

(10) (1902) I. L. R. 26 Mad. 535.

(11) (1921) 4 L. R. 44 Mad. 946.

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doubt that the defendants have asserted the existence of the tenures now in dispute for a period longer than 12 years to the knowledge of the plaintiffs and their predecessors in interest; there is thus no escape from the position that they have acquired the status of a tenure-holder. But although the Subordinate Judge has decided the point in favour of defendants as regards their status as tenure-holder, he has declined to give them the benefit of the principle so far as the conditions of their tenure are concerned. The appellants have contended that there is ample evidence on the record to show that the defendants claimed to have held possession not merely as tenure-holders, but as tenure-holders with the incidents and conditions specified in the document of the 24th January 1856. In this view, there is no escape from the position that the defendants have acquired a right to hold the tenure under the conditions mentioned in that document.

This leads us on to the question, what is the rent which the defendants are liable to pay. They are clearly liable to pay rent on the area in actual occupation on the conditions specified in the document of the 24th January, 1856. Under that document, the tenure-holders are entitled to hold the land at the rate of Rs. 4 per Kani, subject to a deduction of 3-16th, that is to say, to a deduction of an area of 3 Kanis per Drone of land. The result is that the rent is payable at the net rate of Rs. 3-4 per Kani.

We have finally to determine the area for which this rent should be assessed for the years in suit. The evidence on this point is not of a satisfactory character. But we have come to the conclusion that no useful purpose will be served by remanding the case for the purpose of an investigation as to the area in the actual occupation of the defendants during the period in suit. From the materials on the record we have found that during this period the defendants may be assumed to have been in occupation of 160 Kanis, of land. If the rent is assessed on this area at Rs. 3-4 per Kari, the annual rent will be Rs. 520 instead of Rs. 912 as assessed by the Subordinate Judge. The defendants are consequently entitled to succeed to this extent. But we must add that the present decision as to the area is not final; it will hold good only for the years now in suit, and will not bar a future enquiry into the question of area, should such ascertainment be necessary.

We have not dealt with the ingenious arguments addressed to us by both sides at considerable length on an interesting point, namely, that of suspension of rent due to eviction, which would

have been of importance if the *amalnamah* of the 24th January 1856 had been held to be genuine. In that view, a question would have arisen whether the defendants were entitled to the benefit of the principle enunciated in a long series of decisions of this Court from which we have no desire to depart: *Rai Charan v. Administrator-General* (1); *Chandrakant v. Ram Nath* (2); *Ras-heswari v. Saurendra* (3); *Zeanulla v. Sukhiannessa* (4); *Sarip v. Aftab* (5); *Purna v. Rasik* (6); *Ashutosh v. Joy Lal* (7); *Godai v. Aminuddi* (8); *Dwijendra v. Aftab* (9); *Udai v. Katyaini* (10); *Nowrang v. Janardan* (11); *Manindra v. Narendra* (12). At the same time, we must not be taken to affirm the proposition that the principle is applicable even where the tenant is found, as the result of a litigation, to have actually lost his title to a portion of the land of his tenancy by reason of the adverse possession of the grantor. No doubt, the rent remains suspended so long as eviction lasts; but the contention of the appellants goes further and implies that the covenant for quiet enjoyment continues even when the tenant's title to a portion of the land has been extinguished. This will require careful examination on principle when the occasion arises.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge modified. The rent will be assessed for the years decreed by the Subordinate Judge at Rs. 520 instead of Rs. 912. The parties will bear their own costs in this appeal. A self-contained decree will be drawn up in this Court. The order of the lower Court as to costs will stand.

The cross-objection has not been pressed and is dismissed without costs.

A. T. M.

Appeal allowed in part, Decree modified: Cross-objection dismissed.

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(1) (1909) 9 C. L. J. 578; I. L. R. 36 Calc. 578.

(2) (1910) 11 C. L. J. 591.

(3) (1909) 11 C. L. J. 601.

(5) (1910) 13 C. L. J. 115.

(7) (1912) 17 C. L. J. 50.

(9) (1916) 25 C. L. J. 53.

(11) (1922) 36 C. L. J. 28.

(4) (1910) 11 C. L. J. 606.

(6) (1910) 13 C. L. J. 119.

(8) (1913) 18 C. L. J. 509.

(10) (1922) 35 C. L. J. 292.

(12) (1919) 23 C. W. N. 585.

APPELLATE CIVIL.

Before Mr. Justice Pearson, and Mr. Justice Graham.

KAYEM BISWAS

CIVIL.

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May, 20, 21.
June, 2.

v.

BAHADUR KHAN AND OTHERS.*

Suit to set aside decree—Appeal—Irregular order of remand—Decree in former suit comprising excess land—Civil Procedure Code (Act V of 1908), Sec. 47, O. 41 R. 23—Fraud—Jurisdiction.

An appeal lies against an order remanding a case by the appellate Court, which, in form and substance, is an order under O. 41 R. 23 of the Code of Civil Procedure whether regularly or irregularly made: *Basumati v. Taritbasini* (1) and *Frasanna v. Baidya Nath* (2) followed.

The question as to whether the decree in the former suit comprises excess land which did not form the subject matter of the suit, is a question which can only be gone into by the execution Court under section 47 of the Code of Civil Procedure and a fresh suit does not lie.

The main object underlying section 47 of the Code of Civil Procedure is to prevent multiplicity of suits and to secure that all matters, which can be decided in the suit, shall be so decided.

The plaintiff suing to set aside the former decree on the ground of fraud, can only succeed on proving fraud, and in the absence of finding of fraud the merits of the case cannot be gone into in the second suit for setting aside the decree.

The word 'jurisdiction' may be used in two senses, viz. in the sense of jurisdiction over the subject matter of the litigation or in the sense of power to make an order.

Appeal by the defendant.

Suit to set aside an *ex parte* decree.

The material facts appear from the judgment.

Dr. Jadu Nath Kanjilal for the Appellant.

Babus Surendra Chandra Sen and *Hemendra Chandra Sen* for the Respondents.

C. A. V.

The judgment of the Court was as follows :—

*Appeal from Appellate Order No. 118 of 1923, against the order of K. N. Chowdhury Esq, Additional District Judge of Khulna, dated the 1st December, 1922, reversing that of Babu Jogendra Kumar De, Munsiff, Additional Court at Khulna, dated the 20th June, 1921.

(1) (1918) 31 C. L. J. 354.

(2) (1920) 31 C. L. J. 360.

This appeal is against the judgment and decree of the Additional District Judge of Khulna reversing a decision of the Munsif of the additional Court at Khulna and remanding the case for fresh decision in accordance with certain instructions given in the judgment of the lower appellate Court.

The defendant No. 1 Kayem Biswas, now appellant brought a suit in the year 1915 against the plaintiffs respondents for recovery of possession of certain lands on establishment of title, and obtained an ex parte decree. The plaintiffs then filed the present suit to set aside the said decree as fraudulent and without jurisdiction, and for confirmation of their title to the land, and for other consequential reliefs. A number of issues were framed upon the pleadings one of which No. 8 was in the following terms :

"Is the decree in title suit No. 343 of 1915 fraudulent and without jurisdiction as alleged? Is it liable to be set aside?"

The Munsiff found upon this issue that no fraud had been established, and that there was no substance in the objection as to jurisdiction. He accordingly in view of his findings on this issue and on issues 9 and 11 dismissed the suit.

On appeal the learned Additional District Judge without going into the question of fraud, or coming to any finding thereon, held that the decree was without jurisdiction, inasmuch as the claim was for 5 bighas odd whereas the decree was for 12 bighas 15 cattas. He therefore set aside the decree and remanded the case for fresh decision, in the manner indicated above. The defendants thereupon filed this second appeal.

A preliminary objection has been taken on behalf of the respondents to the hearing of the appeal, the argument being that there are only two provisions in the Code of Civil Procedure relating to remand viz., rules 23 and 25 of order 41, and that, as the present case does not come under either, no appeal lies. It is clear that the order was not made under order 41 rule 25. It is urged however on behalf of the appellant that in form and substance the order, though it may have been irregular, must be held to have been made under rule 23 of order 41, and that, that being so, an appeal lies. This view is supported by authority, see *Basumati v. Taritbasini* (1) and *Prasanna v. Baidya Nath* (2) and we think following those decisions that we must hold that the appeal is competent.

On the merits two points have been urged before us on behalf

(1) (1918) 31 C. L. J. 354.

(2) (1920) 31 C. L. J. 360.

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of the appellants. Firstly it is urged, that having regard to the findings of the lower appellate Court and the admitted facts in the Court of first instance the question which arises being, as to whether the decree in the former suit, comprises excess land which did not form the subject matter of the suit, is a question which can only be gone into by the execution Court under section 47 of the Code of Civil Procedure and a fresh suit did not lie. Secondly it was contended that, inasmuch as the plaintiffs sought to set aside the former decree on the ground of fraud, they could only succeed on proving fraud, and in the absence of such finding the merits of the case could not be gone into in the second suit.

In regard to the first point objection is taken on behalf of the respondents that this question was not raised in the Court of appeal below, and that it ought therefore not to be allowed to be argued here for the first time. We think however that we are bound to take notice of the argument. It appears to us too to be well founded. Section 47 Civil Procedure Code lays down that "all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

The main object underlying this section is to prevent multiplicity of suits and to secure that all matters, which can be decided in the suit, shall be so decided. The question which then arises is whether the matter arising in this particular instance was one which ought to be determined by the executing Court and not by separate suit. Now the kernel of the matter according to the lower appellate Court was that the decree was for land in excess of that which formed the subject of the suit and that it included land which ought not to have been included. It seems to us that these are matters for determination by the Court executing the decree, and that looked at from that point of view the subsequent suit was bad.

Coming to the second point it is to be observed that the main contention in the present suit was that the decree had been obtained by fraud. The trial Court came to a definite finding that fraud had not been established. That finding has not been displaced in the judgment of the lower appellate Court. Indeed the learned Judge has not gone into the question of fraud at all. The finding of the first Court upon this point must therefore stand, and in the absence of any such finding in the Court of appeal below

we do not think it was open to the learned Judge to go into the merits of the case. The learned Judge without entering into the question of fraud held that the decree had been passed without jurisdiction and upon this ground held that it should be treated as a nullity and set aside. We do not see how the decree can be regarded as having been made without jurisdiction. The word jurisdiction may be used in two senses, viz., in the sense of jurisdiction over the subject-matter of the litigation, or in the sense of power to make the order. Jurisdiction certainly does not fail here in the former sense, as the Court clearly had territorial jurisdiction over the land in suit, nor has this apparently ever been disputed. It seems to follow therefore that jurisdiction must have been held by the learned Judge to be defective in the other sense, viz., that the trial Court had no power to make the decree as drawn up. In this connection the learned Additional District Judge has observed as follows :—

" Now jurisdiction of a Court in a particular suit is confined to the subject-matter of litigation as specified or set forth in the plaint. No Court can by its decree go beyond that subject matter so as to affect matters outside, or matters not included therein, nor has any Court power to give a plaintiff more than what he claims, or to give him one thing when he claims a different thing altogether in his suit."

The question is, were the plaintiffs in the original suit given a decree for something different from what they asked for? What they asked for was for about 5 bighas of land within certain defined limits. The decree apparently gave them about 5 bighas (vide opening sentences of the judgment of the trial Court), and if the area so decreed included any land which did not form the subject of the suit, that was a matter for the determination of the Court executing the decree, and could not form the subject-matter of a separate suit.

For the reasons stated we think that the decision of the lower appellate Court cannot be supported. The appeal must accordingly be allowed with costs of both Courts, the decree of the Court of appeal below set aside, and the judgment and decree of the Munsif restored.

A. T. M.

Appeal allowed.

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Kayem Biswas

v.
Bahadur Khan.

Before Mr. Justice Suhrawardy, and Mr. Justice Cuming.

CIVIL.

1924.

December, 3, 4, 15.

T. WANG.

v.

SONA WANGDI.*

Appeal—Reference to arbitration—Dispute as to satisfaction of decree—Jurisdiction—Consent of parties—Civil Procedure Code (Act V of 1908), Sec. 47, O. 21, Sch. II. Paras, 1, 15, 16.

An executing Court has no jurisdiction to refer disputes between parties to arbitration.

Any question on which the parties join issue is a dispute within the meaning of paragraph 1, schedule II of the Code of Civil Procedure.

Order 21 of the Code of Civil Procedure relating to execution of decrees is self contained and exhaustive as to the special subject with which it deals.

A proceeding under section 47 of the Code of Civil Procedure is distinct from a suit, and comes into being after the termination of the suit and in course of execution of the decree which concludes the suit.

Paragraphs 15 and 16 second schedule to the Code of Civil Procedure, depend for their operation on a valid reference under paragraph 1. A reference to arbitration by the executing Court being without jurisdiction, should be totally ignored.

Parties by consent cannot confer jurisdiction where it does not exist.

The appellant applied for execution of money decree. The respondent contended that the decree had been fully satisfied out of Court and that, the appellant did not fraudulently certify payment in Court. The Court decided to investigate the allegation of fraud. After several witnesses were examined, the parties filed an application referring the dispute about payment to arbitrators, who, by their award, found a much lesser amount due to the appellant than he was claiming in execution. The award was confirmed by the Court. On appeal by the decree-holder, the lower appellate Court held that no appeal lay. On second appeal :

Held, that an appeal to the lower appellate Court and a second appeal to the High Court lay, as the reference to arbitration being without jurisdiction the award was invalid in law and as the question that was left for consideration was one relating to satisfaction and discharge of the decree under section 47 of the Code of Civil Procedure.

*Appeal from Appellate Order No. 313 of 1923, against the order of C. Bartley Esq., District Judge of Darjeeling, dated the 13th June, 1923, affirming that of Babu N. K. Roy, Subordinate Judge of Darjeeling, dated the 30th November, 1922.

That a party to the submission to arbitration could question the validity of the proceedings instituted at his instance on the ground of jurisdiction : *Girija Nath v. Kanai* (1) and *Dooly Chand v. Mamuji* (2).

Appeal by the Decree-holder.

Application for execution of decree.

The material facts appear from the judgment.

Babu Jitendra Kumar Sen Gupta for the Appellant.

Babus Sharat Chandra Roy Chowdhury and *Santi Kumar Roy Chowdhury* for the Respondent.

C. A. V.

The judgment of the Court was as follows :

This appeal raises an interesting question of law, which so far as we are aware, is not covered by authority. In execution of a money decree obtained by the appellant against the respondent, the respondent contended that the decree had been fully satisfied out of Court and that the appellant practising fraud on the respondent did not certify payment in Court. The appellant contended that the uncertified payment could not be enquired into under order XXI rule 2 Code of Civil Procedure but the learned Subordinate Judge in the execution Court decided to investigate the allegation of fraud. After he had examined several witnesses, the parties filed an application referring the dispute about payment to two arbitrators and an umpire. The case was thereupon referred to the arbitrators who by their award found a much lesser amount due to the appellant than he was claiming in execution. Various objections to the legality of the award were raised by the appellant which were over-ruled by the Subordinate Judge. The concluding portion of the learned Subordinate Judge's judgment is in these words :—"The application of the decree-holder to set aside the award is therefore rejected, the suit is consequently decreed in terms of the award with proportionate costs." The meaning of the last clause is not sufficiently clear but it appears that the learned Subordinate Judge was of opinion that a proceeding under section 47, Code of Civil Procedure, followed as it is by a judgment is a suit which was decided in accordance with the award. Against this decision the appellant decree-holder appealed to the District Judge of Darjeeling who held that no appeal lay to him under section 16, Schedule II Code of Civil Procedure.

The decree-holder has preferred this second appeal on the ground, among others, that the learned District Judge is wrong in holding that no appeal lay to him. A preliminary objection is :

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v.

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December, 15.

(1) (1917) 27 C. L. J. 339.

(2) (1916) 25 C. L. J. 339.

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raised to the competency to this appeal on the ground that, as no appeal lay to the Court of appeal below no second appeal lies to this Court. The preliminary objection really begs the question in this case which is the determination of the nature of the proceedings in the execution Court.

It is contended by the appellant that the reference to arbitration was invalid in law inasmuch as there was no dispute between the parties within section 1, schedule II Civil Procedure Code because the Court could not take notice of uncertified payments alleged by the judgment-debtor. There is no force in this argument. Whether or not the Court can legally enquire into it, any question on which the parties join issue is a dispute within the meaning of that section.

The next point urged is one of substance and deserves careful consideration. It is argued that the second schedule of the Code of Civil Procedure does not apply to execution proceedings and therefore the reference to arbitration was without jurisdiction and *ultra vires* of the executing Court: the award is accordingly illegal and unenforceable. In our judgment this contention is right and ought to prevail. Section 1 of the second schedule empowers reference to arbitration of a dispute between parties to a *suit*. Section 16 provides that a decree should follow the award. The decree must be a decree as is passed in a suit and capable of execution and not merely a judgment as the learned Subordinate Judge seems to think; for by that section the decree is made appealable as a decree where it is not in conformity with the award. It is admitted that all the provisions of the Code of Civil Procedure relating to suits are not applicable in execution proceedings. Order IX: *Hari Charan v. Manmatha* (1); *Bepin Behary Shaha v. Abdul Bari* (2); order XVII: *Tirthasami v. Annappayya* (3); order XXII rule 12, order XXIII rule 4 and of course such other orders that deal with parties to suits or pleadings do not apply to execution of decree. Nothing has been shown to us to persuade us to hold that there is any speciality in the second schedule which makes it applicable to questions arising in the execution of decrees. Section 41 Code of Civil Procedure is more an authority for the view we take and does not lend countenance to the contention of the respondent. As has been explained in *Hari Charan v. Manmatha Nath* (1) the law is the same as it was under section 647 of the Code of 1882

(1) (1913) I. L. R. 41 Calc. 1.

(2) (1916) I. L. R. 44 Calc. 950; 24 C. L. J. 446.

(3) (1894) I. L. R. 18 Mad. 131.

which expressly excluded execution proceedings from those to which provisions relating to suits were extended. The view that the special procedures in suits do not apply to execution of decrees is based on the supposition that Order XLI relating to executions is self-contained and exhaustive as to the special subject with which it deals.

But the learned vakil for the respondent maintains that an order passed under section 47 Code of Civil Procedure is a decree under section 2 and therefore a proceeding under section 47 is a suit. This contention is untenable as a proceeding under section 47 comes into being after the termination of the suit and in course of execution of the decree which concludes the suit. The second clause of section 47 clearly indicates that the proceeding under that section is distinct from a suit.

It is next argued for the respondent that the execution Court having jurisdiction over the proceeding under section 47, the reference to arbitration was not without jurisdiction. We have not been able to follow the reasoning for the appellant's objection is directed against the jurisdiction of the execution Court in following a procedure not warranted by law.

It is further argued that the objection with regard to the illegality of the award must be taken to have been made under section 15 clause (c) of the second schedule as an award "being otherwise invalid" and even if the reference was without jurisdiction the appellant's objection having been overruled and the award confirmed, no appeal lay to the lower appellate Court from the order of the first Court. The answer to this contention is simple. Section 15 and section 16 of the second schedule depend for their operation on a valid reference under section 1 of the schedule. The reference to arbitration by the executing Court being without jurisdiction must be totally ignored and the question that is left for consideration is one relating to the satisfaction and discharge of the decree under section 47, Code of Civil Procedure. The appeal to the lower appellate Court and a second appeal to this Court are therefore competent.

It is faintly suggested that the appellant being a party to the submission to arbitration he should not in equity be allowed to question the validity of the proceedings initiated at his instance. It is also submitted that the Court having jurisdiction over the subject of the litigation, parties can by consent invest it with power to do something not strictly within its jurisdiction. It is an elementary principle of law that parties by consent cannot confer

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jurisdiction where it does not exist. In *Girijanath Roy Chowdhury v. Kanai Lal Mitra* (1), and *Seth Dooly Chand v. Mamaji Musaji* (2) one of the parties to the submission was permitted to successfully question the validity of an award on the ground that all the parties to the suit had not joined in the reference. These decisions afford complete answer to the other contentions raised by the respondent.

We are not called upon in this case to consider the question of the validity of an award on a reference to arbitration without the intervention of Court by way of adjustment of the decree under order XXI rule 2.

Though we look upon the conduct of the appellant with disapproval we are constrained in the view we take of the law to uphold his contention that the execution Court had no jurisdiction to refer the dispute between the parties to arbitration under the second schedule of the Civil Procedure Code. In this view we are of opinion that an appeal lay to the lower appellate Court from the order of the first Court giving effect to the award but it is not necessary to remit the case to the Court of appeal below for a re-hearing of the appeal as we have by our judgment decided the sole question raised in that Court.

In the result the appeal is allowed and the order of the execution Court upholding the award set aside. The case will be sent back to that Court with a direction to proceed with the execution according to law. We make no order as to costs of this appeal; the order relating to costs passed by the Courts below will stand.

A. T. M.

Appeal allowed: Case remanded.

(1) (1917) 27 C. L. J. 339.

(2) (1916) 25 C. L. J. 339.

*Before Sir Hugh Walmsley, Knight, Judge, and
Mr. Justice B. B. Ghose.*

DAYAMAYI (ALIAS) BIDDYU FLATA DEBI

v.

SANKAR NATH MUKHOPADHYAYA AND OTHERS.

CIVIL.

1924

December 17, 1924.

Ejectment—description—Suit for declaration of debutter properties—Person interested—Will, construction of—Gift to ancestral Idols—Shebait.

The omission to describe the plaintiff in the cause title as shebait of the Idols

*Appeal from Original Decree No. 174 of 1913 against the decree of Babu Atul Chandra Das Gupta, Officiating Subordinate Judge of Bogra, dated the 18th June, 1913.

is a misdescription but it may be cured by amendment without any hardship to the defendant.

The plaintiff, who is interested in the worship of a certain Idol, can alone maintain a suit for declaration that certain properties are the debutter properties of his ancestral Idol.

In the previous portion of a clause of the will, properties were given by the testator to A, his daughter-in-law with power to make gift, sale, mortgage or any permanent maurasi makarrari settlement. The subsequent portion of the same clause was to the effect that A should transfer only with the consent of her husband B and the testator's other sons and grandsons. B took out probate of the will of A by which she dedicated properties to the Idol and accepted the position that the properties were properly dedicated for Debsheba :

Held, that the restriction imposed in the will was repugnant to the gift.

That the person claiming through B could not raise any question as to the validity of the disposition made under the will of A.

When the worship of an Idol has been founded, the shebaitship is vested in the founder and his heirs unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution : *Kali Krishna v. Mahan* (1) and *Ananda v. Brojo Lal* (2).

Where the worship of an Idol has been founded, there must be some shebait of the Idol and, if any donor, subsequent to the foundation makes a grant of any property to the Idol, it becomes the property of the Idol and unless conditions are attached to the gift the existing shebait of the Idol would have the power to manage that property on behalf of the Idol.

Appeal by Defendant No. 1.

Suit for ejectment.

The material facts appear from the judgment.

Messrs B. Chuckerbutty, G. C. Sen and Babu Bhupendra Kumar Ghose for the Appellant.

Babus Mahendra Nath Ray, Rishindra Nath Sarkar, Rupendra Kumar Mitter, Promotha Nath Bandopadhyaya and Satindra Nath Roy Chowdhury for the Respondents.

The judgments of the Court were as follows :—

B. B. Ghose, J :—This appeal arises out of an action in ejectment brought by the plaintiff on the allegation that the defendant No. 1 is in possession of certain properties as trespasser. In order to understand the facts, it is necessary to refer to the following genealogical table :

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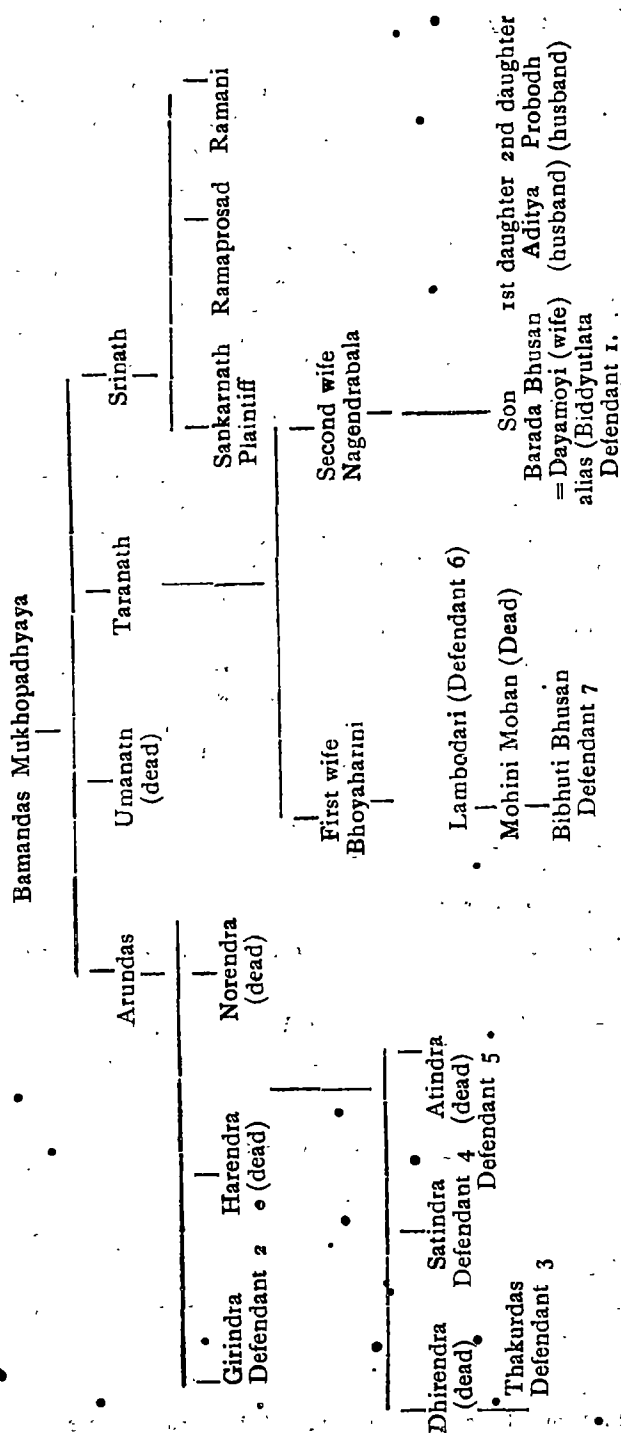
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(1) (1922) I. L. R. 50 Calc. 233.

(2) (1922) I. L. R. 50 Calc. 292.

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Bamandas Mukhopadhyaya, died possessed of considerable property. He made a will dated the 7th January 1875 making certain dispositions of his property. A portion of the property disposed of by the will was given to his daughter-in-law Bhoyaharini, first wife of his son Taranath and this is the property now in dispute. Bhoyaharini died on the 18th November 1881 after having executed a will dated the 16th November 1881. By clause (1) of her will, she dedicated certain properties as debutter to the ancestral Thakur of her father-in-law Sri Sri Sridhar Salgram Thakur and certain other properties for the performance of the ancestral Durga Puja, Syama Puja and Jagadhatri Puja. After her death, her husband Taranath obtained probate of her will and he died on the 15th of August 1908 after having executed a will on the 21st February 1908. Before Taranath obtained probate of his wife's will, some of the descendants of Arundas, the eldest son of Bamandas, had taken out probate of that will. But that grant was revoked on the application of Taranath and Taranath himself obtained probate as already stated. Taranath, it is said, was in possession of the disputed properties and performed the sheba of the Idol and the Pujahs. Taranath had a son named Barada Bhusan by another wife Nagendrabala. This Barada Bhusan died on the 10th March, 1909. Defendant No. 1 is the widow of Barada Bhusan and she is in possession of the properties. After Barada's death, it appears that the present plaintiff Sankarnath who is one of the sons of Srinath the youngest son of Bamandas Mukerji, applied unsuccessfully for probate of the will of Bhoyaharini on the allegation that he had been appointed executor. The Court found that there was nothing to administer and, on that ground, Sankarnath's application for probate was refused. The present suit has been brought by Sankarnath on the ground that he is the sole shebait appointed under the will of Bhoyaharini and is, therefore, entitled to possession of the debuttur properties as against the defendant No. 1 who has no right to possession. The plaintiff has impleaded in the suit all the descendants of Arundas and the daughter and daughter's grandson of Bhoyaharini as defendant. He appears to have brought the suit in his personal capacity. In the body of the plaint, however, he describes himself as shebait and the principal prayers in the plaint are, (1) that a decree be given declaring that the properties mentioned in schedules Ka and Kha are debuttar properties according to the will of Bhoyaharini Debi, and, (2) that it may be declared that the plaintiff has a right to the said properties as manager or shebait and that a decree be

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given to him for Khas possession of those properties by evicting the defendant No. 1. The other prayers are subsidiary to these two principal prayers.

The defendant No. 1 resisted the plaintiff's claim on various grounds which it is unnecessary to mention in detail.

A large number of issues were framed in the lower Court; but the Subordinate Judge has decided the three main points. He has found, first, that the properties in dispute are absolute debuttur properties created by the will of Bhoyaharini, secondly, that the plaintiff was appointed shebait and, thirdly, that as such shebait, the plaintiff is entitled to possession by ejecting the defendant No. 1.

The defendant No. 1 appeals to this Court and some formal grounds have been taken on her behalf: (1) that the plaintiff's suit has not been properly constituted as he has brought the suit in his personal capacity and (2) that there is defect of parties as the two brothers of the plaintiff have not been joined as defendants. It is also stated that there is no allegation in the plaint that the plaintiff asked the pro-forma defendants to join as plaintiffs in the suit and they refused to do so, and on that ground the suit ought to fail. In my judgment, none of these grounds is sufficient for the dismissal of the suit. The omission to describe the plaintiff in the cause title as shebait of the Idol is certainly a misdescription but it may be cured by amendment without any hardship to the defendant. With regard to the other objections, the answer seems to be that the plaintiff alone can maintain a suit for declaration that certain properties are the debuttur properties of his ancestral Idol, he being a person interested in the worship of that Idol.

Of the principal points, that were urged on behalf of the appellant the first was that the properties were not debuttar on the ground that Bhoyaharini had no right to dedicate the properties as she had no absolute title in them. It is contended that the object of Bamandas in making the gift in favour of his daughter-in-law was that she should hold the property for the benefit of the heirs of Taranath and that she was in the position of a mere trustee. Reliance has been placed upon a passage in the second clause of the will of Bamandas that any transfer by Bhoyaharini should be made only with the consent of Taranath and the other sons and grandsons of Bamandas. In the previous portion of that very clause of the will, however, the property was given to Bhoyaharini with power to make gift, sale, mortgage or any permanent maura-rasi makurari settlement. That clearly shows that the intention of

the testator was to make an absolute gift in favour of the lady. The subsequent restrictions must, therefore, be considered as repugnant to the gift. In my opinion, there was an absolute gift to the lady. Further, her husband Taranath himself took out probate of the will of Bhoyaharini by which the properties were dedicated and he accepted the position that the properties had been properly dedicated for devasheba. The defendant No. 1 claiming through Taranath as the heiress of his son Barada Bhusan can hardly raise any question as to the validity of the dispositions made under the will of Bhoyaharini. I am of opinion that the decision of the Subordinate Judge that a valid debuttar was created by Bhoyaharini by her will is correct.

The next question that arises is whether the plaintiff can claim the properties as the sole shebait of the Thakurs. This claim is based upon the fourth clause of the will of Bhoyaharini where she names a number of persons besides her husband Taranath as executors. It is contended on behalf of the appellant that assuming that under that clause Bhoyaharini had appointed the plaintiff as shebait, she could not appoint a new shebait of the ancestral Idols, the shebait of those Idols being all the heirs of the original founder of the worship according to Hindu Law. The question has been considered by this Court in two recent cases: *Kali Krishna Roy v. Makhanlal Mukerji* (1), and *Ananda Chunder Chuckerbutty v. Broj Lal Singh* (2). In the last mentioned case, it was held that "when the worship of an Idol has been founded, the shebaitship is vested in the founder and his heirs unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution," and the cases of *Goswami v. Ramanlalji* (3) and *Jagadindra v. Hemanta Kumari* (4) were cited in support of that proposition. It has been endeavoured on behalf of the plaintiff respondent to distinguish these cases on the ground that in those cases there was some pre-existing property of the Idol and any grant to the Idol by a person other than the founder is only an accretion to the pre-existing endowment and the subsequent donor cannot therefore appoint new shebait. It is contended that there being no evidence in this case that the Idols had any endowed property prior to the gift by Bhoyaharini she was entitled to appoint shebait for

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(1) (1922) I. L. R. 50 Calc. 233. (2) (1922) I. L. R. 50 Calc. 292.

(3) (1889) I. L. R. 17 Calc. 3; L. R. 16 I. A. 237.

(4) (1904) I. L. R. 32 Calc. 129; L. R. 31 I. A. 203.

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the Idols who would manage the property. But it seems to me, there is really no difference in principle between the two positions. Where the worship of an Idol has been founded, there must be some shebait of the Idol and, if any donor subsequent to the foundation makes a grant of any property to the Idol, it becomes the property of the Idol and unless conditions are attached to the gift the existing shebait of the Idol would have the power to manage that property on behalf of the Idol. In that view, the plaintiff and all the heirs of the founder of the Thakurs including the defendant No. 1 are shebait of the Idols in question and have the power to manage the properties on behalf of the Thakurs. Further, it seems to be extremely doubtful whether by clause (4) of her will Bhoyaharini purported to appoint any shebait. It may be conceded that the meaning of the word "Executor" is not properly understood in the Muffussil and in some cases it may include the office of a shebait having reference to the context. But in clause (4) of her will, Bhoyaharini does not mention anywhere that the executors will perform the sheba of the Idols and in clause (5), the duties imposed upon the executors with reference to the debutter properties are laid down and they do not include the sheba of the Idols. That being so, it cannot be held that plaintiff is the sole shebait and the defendant No. 1 cannot be considered to be a trespasser being herself a shebait of the Thakurs as the heir of her husband, a descendant of the founder. On these grounds the suit for ejectment must fail. It must, however, be declared that the properties dedicated by Bhoyaharini Debi are debuttar properties of the Thakurs mentioned in clause (1) of her will.

The appeal is, therefore, allowed in part and the decree of the Subordinate Judge is modified in this way: It is declared that the property mentioned in schedule Ka of the plaint is the debutter property by Bamandas Mukerji's ancestral deity Sri Sri Sridhar Salgram Thakur and that the property mentioned in schedule Kha is the Debuttar property for Bamandas Mukerji's ancestral Pujahs of Durga, Syama and Jagadhatri Thakurs, and that the plaintiff as well as the defendant No. 1 along with all the other heirs of Bamandas are shebait of those Thakurs. The decree of the Subordinate Judge allowing ejectment of the defendant No. 1 is set aside and the plaintiff's suit in that respect is dismissed. As the plaintiff's suit in ejectment has failed, the defendant No. 1 appellant will be entitled to recover her costs in this Court from the plaintiff respondent. We assess the hearing fee at twenty gold

mohurs. But as the defendant No. 1 resisted the suit on the ground that the properties were secular properties and as that contention has failed she will not be entitled to the costs of the Court below and each party should bear his own costs in that Court. The other parties will bear their own costs throughout.

Walmsley J:—I agree.

A. T. M.

Appeal allowed in part.

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CIVIL RULE.

Before Mr. Justice D. N. Chakravarti.

BADIAR RAHAMAN

v.

SARADA KANTA DATTA AND OTHERS.*

CIVIL.

1925.

March, 12

Execution sale—Setting aside of—Person attaching before judgment, if can apply—Civil Procedure Code (Act V of 1908), O. 21 R. 90.

* A person, who has obtained an attachment of property before judgment, cannot apply under O. 21 R. 90 of the Code of Civil Procedure to set aside a sale of the property in execution of decree : *Jogendra v. Monmotho* (1) followed.

Application for Revision under section 115 of the Code of Civil Procedure by the Petitioner.

Application to set aside an execution sale under O. 21 R. 90

C. P. C. on the ground of irregularity of procedure. The applicant obtained an attachment of the property sold before judgment.

The facts of the case as appear from the judgment of the lower Court are as follows :

" The land in suit was attached by the present decree-holder on 25th March, 1922 in execution of his decree and at the instance of the petitioner those lands were attached before judgment on 22nd April, 1922, that is, nearly a month after the lands had been attach-

• Civil Rule No. 1321 of 1924, against the order of Babu Ananga Mohan Lahiri, Subordinate Judge of Noakhali, dated the 2nd June, 1924, affirming that of Babu Saroj Kanta Banerjee, Munsiff of Noakhali, dated the 28th September, 1923.

(1) (1912) 16 C. L. J. 565 ; 17 C. W. N. 80.

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March, 12.

ed by the decree holder. The lands were sold at the instance of this decree-holder on 14th September, 1922 and the petitioner's suit in which the order for attachment before judgment had been passed was pending at the time."

Babu Bepin Chandra Bose for the Applicant.

Babu Jitendra Kumar Sen for the Opposite Party.

The following judgment was delivered by

Chakravarti, J:—This Rule in my opinion is concluded by the judgment in the case of *Jogendra Nath Chatterjee v. Monmotho Nath Ghose* (1). No doubt in later cases notably in the case of *Dhirendra Nath Roy v. Kamini Kumar Pal* (2) it has been pointed out that an attaching creditor after he has obtained his decree is a person who comes within the purview of the amended words of rule 90 order 21 Code of Civil Procedure. This later case, however, distinguishes the case of *Jogendra v. Monmotho* (1) and in no way touches the authority of the earlier case. In this state of the authorities I am bound to follow the case of *Jogendra Nath Chatterjee v. Monmotho Nath Ghose* (1). That being so, this Rule fails and must be discharged.

In the circumstances I make no order as to costs.

A. T. M.

Rule discharged.

(1) (1912) 16 C. L. J. 566; 17 C. W. N. 80.

(2) (1924) I. L. R. 51 Calc. 425; 28 C. W. N. 899.

PRIVY COUNCIL.

PRESENT.—*Lord Sumner, Sir John Edge, and Lord Salvesen.*

P.C.

1925.

May, 18.

June, 11.

KONDAPALLI VIJAYARATNAM AND ANOTHER

v.

MANDAPAKA SUDARSANA RAO AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT MADRAS.]

Will—Minor's joint will and authority to adopt—Registration—Requirements for validity thereof—Majority Act (IX of 1875), Sections 2 and 3—Succession Act (X of 1865), section 46—General Clauses Act (X of 1897), section 2—Registration Act (III of 1877), sections 17, 23, 40 and 41.

A document purporting to be a will and an authority to adopt a son was

executed by a youth aged 19 years who was under the legal guardianship of his mother. He died immediately after executing the document on the 1st October, 1906, leaving him surviving his widow (the grantee of the aforesaid authority to adopt), his mother above-mentioned, and two daughters. On the 2nd November, 1906, the father of the boy with reference to whom the widow subsequently went through a form of ceremony of adoption, presented, without the knowledge of the testator's widow or mother, the document for registration, and it was eventually so registered as a will on the 20th December, 1906. On the 24th December 1913, the widow went through a ceremony of adopting as a son, the son of the person who had presented the document for registration in November 1906, and the deed of adoption that she executed on that date recited that the adoption was in exercise of the power in that behalf contained in the testator's will of the 1st October, 1906 :

Held (1) the will, being that of a minor under guardianship, it was, under the Majority Act, section 23, the Succession Act, section 46, and the General Clauses Act section 3, void and of no effect as to the testator's estate.

(2) Under the Registration Act, 1877, that part of the document that contained the authority to adopt not being registered within four months by or at the instance of the grantee thereof, was also void, as also was the deed of adoption of the 24th December 1913 and the act of adoption which it purported, to carry out in pursuance of the will of the 1st October, 1906 : *Jagannatha Bheema Deo v. Kunja Behari Deo*, (1).

A power to adopt may be embodied in a will referred to.

A will by a minor has no legal effect and is not capable of disposing of any of the estates of the deceased.

• A document which purports to be a will but is inoperative as such may constitute a valid authority to adopt.

Appeal from a decree (16th April 1920) of the High Court of Madras (Sir J. Wallis, C.J. and Moore J.), affirming a decree (30th December, 1918) of the District Judge of Ganjam (B.C. Smith Esq.).

On the 1st October, 1906, Mandapaka Appanna, aged 19 years, and being under the legal guardianship of his mother, executed a will, which *inter alia* stated as follows.—“I have only two daughters. My wife, Seekaramamma, must adopt a boy when she likes” ;

He died later on the same day, and the document was presented for registration on the 2nd November 1906 without the knowledge or consent of the testator's mother or widow by Lakshmi Narasayya, uncle of Sudarsana Rao, the first respondent, and the Sub-Registrar accordingly registered it on the 20th December, 1906. On the 24th December 1913, the appellants' mother, Seekaramamma aforesaid, went through a ceremony of adopting the said Sudarsana Rao, and in the deed of adoption that she executed simultaneously she recited

(1) (1921) L. R. 48 I. A. 482 ; 26 C. W. N. 374.

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Mandapaka.

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that she had been authorised to make the adoption under her husband's aforesaid will dated the 1st October, 1906. This deed was registered on the 16th February, 1914.

On the 22nd March 1916, the appellants, being the two daughters of the abovenamed testator, by their next friend, instituted the present suit against Sudarsana Rao, Seekaramamma, and the parents of the said Sudarsana, asserting that their mother, Seekaramamma, was entitled to possess their father's estate for her life, and that they were her heiresses after her death, and claiming declarations that,—

(1) the aforesaid will be declared void and illegal, and did not confer on their mother any authority to adopt;

(2) the alleged adoption of Sudarsana was illegal and invalid in law;

(3) the alienations so far made by the mother were not valid beyond her lifetime; and

(4) the title to the deceased's lands belonged to the mother during her life-time;

The District Judge of Ganjam (B. C. Smith, Esq.) who tried the suit, on the 13th December 1918, dismissed it, and the High Court (Sir J. Wallis, C.J. and Moore, J.) upon appeal on the 16th April 1920 upheld his decision. The plaintiffs thereupon appealed to His Majesty in Council.

S. Hyam and *B. N. Sripastava* for the Appellants.

N. Ingram for the Respondents.

The arguments appear sufficiently from the judgment of their Lordships.

The judgment of the Board was delivered by

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Lord Salvesen :—The circumstances out of which this suit has arisen, so far as they are material to the judgment, may be very shortly stated.

One Mandapaka Appanna, a Sudra in the Ganjam district, who was possessed of a considerable amount of property, died in 1905 leaving a widow and two daughters, the latter being the plaintiffs in the action. When on his death bed and within an hour or two of his actual death he executed a document, which purported to be a disposition of his property and at the same time conferred a power of adoption on his widow. This document was registered as a will at the instance of a legatee. It was challenged by the plaintiffs (who are still in minority) on the ground among others (1) that it was not genuine and (2) assuming that the signature which it bore to be that of the deceased, that he was incapable at the time

of understanding its contents owing to the illness from which he shortly afterwards died.

Both Courts have decided, although with much hesitation, that the will was genuine and on the question whether the deceased was in a fit condition to dispose of his property, the Subordinate Judge held that he was, and the High Court of Judicature at Madras may be presumed to have endorsed his judgment, although they have not expressly dealt with this matter in their reasons. Whether it is competent in these circumstances for their Lordships' Board to entertain an appeal from what may be represented as concurrent judgments on questions of fact it is unnecessary to consider, for a point of law remains, the decision of which in their Lordships' view is sufficient for the disposal of the appeal.

At the time of his death Mandapaka Appanna was admittedly only 19 years of age and was under guardianship. Act No. 9 of 1875 provides, section 2, that nothing therein contained should affect the capacity of any person to act in the following matters, namely :—Marriage, Dower, Divorce, Adoption.

Section 3 provides as follows :—

“ Subject as aforesaid, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act (No. X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before :

“ Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before.”

It follows, therefore, and indeed is matter of admission, that the document which purported to be a will of Mandapaka Appanna could have no legal effect as such. On the other hand, as Mandapaka Appanna was over 18 years of age an authority to adopt, whether oral or in writing, was within his legal capacity.

A power to adopt may be embodied in a will and if the document now under consideration can be treated as such the judgment under appeal cannot be impugned. “Will” is defined by Act 10, 1865, as :—

“ The legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death,”

and by section 3 of Act 10 of 1877 :—

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"Will shall include a codicil and every writing making a voluntary posthumous disposition of property."

The learned Judges in the Court below have held that the document in question satisfied these definitions. If the form of the document only is considered no doubt that would be so, but, having regard to the fact that it was executed by a person who was a minor and incapable of making a will, their Lordships are unable to agree with the decision. The so-called will is not a "legal declaration of the intentions of the testator," for it had no legal effect and was not capable of disposing of any of the estates of the deceased. So far as it purported to deal with his property it was a nullity. That a document is called a will although it does not operate to any effect as such will not give it the effect of a will for any other purposes. This was so held in the case of *Jagan-natha Bheema Deo v. Kunja Behari Deo* (1), a case which was not before the learned Judges of the High Court as it was not decided till after their judgment had been pronounced.

It does not follow, however, as the learned Subordinate Judge held that "a person who is incapable of making a will is incapable of conferring an authority to adopt by a will though he may be capable of giving an authority to adopt to be exercised after his death." Their Lordships see no reason to doubt that a document which purported to be a will but was inoperative as such might nevertheless constitute a valid authority to adopt. Here, however, the respondents are met with a different objection. Act No. 3 of 1877 provides, section 40 :—

"the donor, or after his death the donee, of any authority to adopt, or the adoptive son, may present it to any registrar or sub-registrar for registration." and section 41 provides that an authority to adopt shall be registered in the case of the death of the donor on the registry officer being satisfied

(a) that the authority was executed by the donor

(b) that the donor is dead, and

(c) that the person presenting the authority is, under section 40 entitled to present the same.

In the present case it is not alleged that the donee, who, at the time of the registration of the document as a will was the only one who could present it for registration, either did so herself or gave authority for the registration. Act III of 1877, Part 3, section 17, enacts that all authorities to adopt a son executed after the 1st January, 1872, shall be registered, and by section 23, that no docu-

ment other than a will shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution. As the widow, who was the donee of the authority, failed to register it within this period of four months, the deed which was afterwards executed by her on 24th December, 1913, adopting defendant No. 1, cannot receive effect. This indeed was not contested by the respondent's counsel.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed and that the plaintiffs are entitled to a declaration, that the will dated the 1st October, 1906, alleged to have been executed by the late Mandapaka Appanna is void, and also to a declaration in terms of the 2nd, 3rd, and 4th heads of their prayer with costs of the suit both in the Courts below and before this Board.

Barrow, Rogers and Nevill : Solicitors for Appellants.

H. S. L. Polak : Solicitor for Respondents.

A. dem.

Appeal allowed.

APPEAL FROM ORIGINAL CIVIL

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and
Mr. Justice Buckland.*

KISSEN GOPAL BOGREE

v.

L. J. BAVIN.*

Assignment—Transfer of Property Act (IV of 1882), Sec. 130—Order for payment of money—Intention—Common Law and Equity—Test.—Summons.

A sold and delivered to B a lathe at a certain price. A then assigned the bill against B to C in these terms : " B, kindly remit to C, who will collect on our behalf for and on behalf of A ":

Held, that the above words did not amount to an assignment of the debt due to A within the meaning of section 130 of the Transfer of Property Act, but to a mere order for the payment of money due by B.

*Appeal from Original Order No. 178 of 1924, against the order of Mr. Justice C. C. Ghose, dated the 25th August, 1924.

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The summons taken by the liquidator in this case is not in usual form.

Per C. C. Ghose, J. At Common Law a debt was looked upon as a strictly personal obligation and an assignment of it was regarded as a mere assignment of a right to bring an action at law against the debtor. After a time the Common Law Courts recognised the right of any one who had a pecuniary interest in the debt to sue in the name of the creditor. Courts of Equity admitted the title of an assignee of a debt, regarding it as a piece of property an asset capable of being dealt with like any other asset, and treating the necessity of action at law to get it in as a mere incident : *Prosser v. Edmonds* (1). Every such assignment was considered in equity as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt or to reduce the property into possession. In order to constitute an assignment of a debt or other chose in action in equity, no particular form is necessary.

An assignment of a chose in action must be made in writing under the Indian law, signed by either the transferor or his duly authorised agent but no particular form of words is necessary provided that the words are sufficiently indicative of the transferor's intention to assign the chose in action. All that is necessary "is that the debtor should be given to understand that the debt has been made over by the creditor to some third person."

An order for payment of money is not the same thing as an assignment of the debt but a direction in writing to pay the amount due on an instrument endorsed on such instrument by the payee thereof, coupled with the delivery of the instrument so endorsed to the person to whom payment is directed, is a valid assignment within the meaning of section 130 of the Transfer of Property Act : *Rama v. Venkatachellam* (2).

The test is whether or not the right of the seller of the goods to the price of the same has been transferred to a third party by an effectual assignment that the assignee becomes entitled as of right to the payment.

Appeal by the Objector.

Application on behalf of the Official Liquidator, Mr. L. J. Bavin, for directions as to whether he or the appellant Kissen Gopal Bogree is entitled to certain amount due on a bill for the price of lathe.

The material facts appear from the following judgment of

C. C. Ghose J. This is an application on behalf of the Official Liquidator for directions as to whether he or one Kissen Gopal Bogree is entitled to a sum of Rs. 1800-2-0.

The short facts are as follows :—In the early part of 1923 the Eastern Machinery and Engineering Co. Ltd. sold and delivered to Messrs. Kilburn & Co. a lathe, the price of which was Rs. 2,000-2-0. An allowance of Rs. 200 was claimed by Messrs. Kilburn & Co. which claim was admitted. There remained there-

(1) (1835) 1 Y & C. Ex. 481 (491).

(2) (1906) 1, L. R. 30 Mad. 75.

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fore due and owing to the company by and from Messrs Kilburn & Co. a sum of Rs. 1800-2-6. One Kissen Gopal Bogree claims to be entitled to the same by virtue of an assignment alleged to have been made by the company on the 17th May 1923. The liquidator submits that if an assignment was made it was a fraudulent preference on the part of the company and therefore invalid and secondly, that the assignment, such as it is, does not operate in law as a valid assignment. The assignment which is on the back of the bill against Messrs. Kilburn & Co., is in these terms: "Messrs. Kilburn & Co., kindly remit to Babu Kissen Gopal Bogree, who will collect on our behalf for and on behalf of the Eastern Machinery and Engineering Co., Ltd. Metcalf & Co. Secretaries."

The sole question, therefore, which I have got to determine on this application is whether the above words amount to an assignment of the debt due to the company within the meaning of section 130 of the Transfer of Property Act. It was a well known rule of the Common Law that no possibility, right, title or thing in action could be granted to third persons, because it was thought that a different rule would be the occasion of multiplying contentions and suits. At Common Law a debt was looked upon as a strictly personal obligation and an assignment of it was regarded as a mere assignment of a right to bring an action at law against the debtor. Hence the assignment was looked upon as open to the objection of maintenance (see Hawkens' Pleas of the Crown Vol. I, 458); after a time the Common Law Courts recognised the right of any one who had a pecuniary interest in the debt to sue in the name of the creditor. This was the limit of their departure from the old strict rule. But the Courts of equity took a different view [see *Row v. Dawson* (1)]. Courts of equity admitted the title of an assignee of a debt regarding it as a piece of property an asset capable of being dealt with like any other asset, and treating the necessity of an action at law to get it in as a mere incident [see *Prosser v. Edmonds* (2)]. Every such assignment was considered in equity as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt or to reduce the property into possession. The doctrine of the Courts of equity is so nearly coincident with the rules obtaining in the civil law and in the jurisprudence of the modern commercial nations of continental Europe that perhaps I may be allowed to quote the following passage from Pothier on Sales (Ed. Cushing), "A credit being a

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(1) (1749) 1 Vns. Sen 331.

(2) (1835) 1 Y. and C. Ex. 481 (491).

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personal right of the creditor, a right inherent in his person, it cannot, considered only according to the subtlety of the law, be transferred to another person nor consequently be sold. It may well pass to the heir of the creditor because the heir is the successor of the person and of all the personal rights of the deceased. But in strictness of law it cannot pass to a third person; for the debtor being obliged towards a certain person cannot by a transfer of the credit which is not an act of his, become obliged towards another. The juriconsults have nevertheless invented a mode of transferring credits without either the consent or the intervention of the debtor as creditor may exercise against his debtor by a mandatory as well as by himself the action which results from his credit. When he wishes to transfer his credit to a third person he makes such person his mandatory to exercise his right of action against the debtor it is agreed between them that the action shall be exercised by the mandatory in the name indeed of the mandator, but at the risk and on the account of the mandatory who shall retain for himself all that may be exacted of the debtor in consequence of the mandate without rendering any account thereof to the mandator. Such a mandatory is called by the juriconsults procurator in *rem suam*. From this it was established in practice that credits might be transferred, given, sold or disposed of by any other title and it was not even necessary that the act which contains the transfer should express the mandate in which as has been explained the transfer consisted." In order to constitute an assignment of a debt or other chose in action in equity no particular form is necessary. An assignment of a chose in action must be made by writing under the Indian law, signed by either the transferor or his duly authorised agent but as stated above no particular form of words seems to be necessary provided that the words used are sufficiently indicative of the transferor's intention to assign the chose in action. As was observed by Lord MacNaghten in *Brandts v. Dunlop Rubber Co.*, (1). "It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person" and order for payment of money is however not the same thing as an assignment of the debt but a direction in writing to pay the amount due on an instrument endorsed on such instrument by the payee thereof,

(1) (1903) A. C. 454.

coupled with the delivery of the instrument so endorsed to the person to whom payment is directed is a valid assignment within the meaning of section 130 [see *Rama v. Venkatchellam* (2)] Therefore the test is in a case like this whether or not the right of the seller of the goods to the price of the same has been transferred to a third party by an effectual assignment that the assignee becomes entitled as of right to the payment. Now I have given to the words used in the present instance by the company my most careful consideration and I am of opinion that they do not amount to anything more than a mere order for the payment of money due by Messrs. Kilburn & Co. In my judgment the words used do not amount to an assignment within the meaning of section 130 of the Transfer of Property Act.

The result, therefore, is that in my opinion the Official Liquidator is not bound to pay the sum claimed to Kissen Gopal Bogree. The latter must pay the costs of this application. All other costs to be retained by the liquidator out of the assets.

Against this order, the objector appealed under the Letters Patent.

Messrs. S. N. Banerjee and B. C. Ghose for the Appellant.

Mr. Surita for the Respondent.

The judgments of the Court were as follows :—

Sanderson C. J. :—This is an appeal by Kissen Gopal Bogree against the judgment of my learned brother Mr. Justice C. C. Ghose delivered on the 25th of August 1924.

The summons was in an unusual form. It was taken out by the liquidator of the Eastern Machinery and Engineering Co., Ltd. which is in liquidation, and it was addressed to Kissen Gopal Bogree : and, the application was for a direction whether a sum of Rs. 1800-2-0 as stated in the petition in support of the application should be paid to L. G. Bavin the liquidator or to Kissen Gopal Bogree.

The petition was presented by L. J. Bavin the liquidator of the company and was countersigned on behalf of Messrs. Kilburn and Co.

It appears that the Eastern Machinery and Engineering Co. Ltd. had sold a lathe to the Diamond Drill Syndicate Ltd. through Messrs. Kilburn & Co. and the price of the lathe was Rs. 2000-2-0 : a sum of Rs. 200 was to be deducted for a reason which it is not necessary for me to mention and, Messrs. Kilburn & Co. were prepared to pay the sum of Rs. 1800-2-0. But this sum was

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claimed by the appellant : It was alleged that he had lent money to the Eastern Machinery and Engineering Co. Ltd, and that the company had endorsed the bill in respect of the lathe and had handed the bill to the appellant in order that he might collect the money on account of the debt due to him from the Eastern Machinery and Engineering Co. Ltd.

The endorsement was in these terms : " Messrs. Kilburn & Co. kindly remit to Babu Kissen Gopal Bogree who will collect on our behalf". The learned Judge came to the conclusion that the endorsement was not an assignment of the debt which was owing by Messrs. Kilburn to the Eastern Machinery and Engineering Co. Ltd., and that it was nothing more than an order to pay.

In the first instance the learned counsel who appeared for the appellant took an objection that the procedure, which was adopted in this case, was wrong, and that the learned Judge had no jurisdiction to deal with the matter upon the summons which was issued ; but after further discussion it was agreed by the learned counsel representing the appellant and respondent that the statement of facts which appear in paragraphs 2 and 3 of the affidavit of Rajani Kanta Banerjee affirmed on the 28th July, 1924, should be admitted and that this Court should finally dispose of the dispute between the parties.

In my opinion this was a wide course for the parties to adopt having regard to the fact that the amount of money in dispute is Rs. 1800 only and it is undesirable that further costs should be incurred in the litigation of this question.

In my judgment the question depends upon what interpretation is to be placed upon the endorsement.

The endorsement was signed by Messrs. Metcalfe & Co., who were acting as secretaries of the Eastern Machinery and Engineering Co. Ltd, and in that respect the provisions of section 130 of the Transfer of Property Act were complied with.

But the question remains whether the words which were used were sufficient to cause Messrs. Kilburn & Co. to understand that the debt which was owing from them to the company, had been made over by the Eastern Machinery and Engineering Co., Ltd. to the appellant. The learned Judge put the interpretation, which I have already mentioned upon the above mentioned words. In my opinion they are clearly susceptible of that interpretation. It is impossible to leave out of consideration the words "who will collect on our behalf" which in their ordinary meaning would go to

show that Kissen Gopal Boglee was not to collect the money on his own behalf but was to collect it on behalf of the Eastern Machinery and Engineering Co. Ltd.

I am, therefore, of opinion that the interpretation which the learned Judge put upon the words was correct and that this appeal should be dismissed with costs. The liquidator's costs will be taxed as between attorney and client and paid out of the assets of the estate in his hands; any costs recovered from the appellant to be credited to the estate.

Buckland, J.:—I agree.

O. C. Ganguly & Co. : Solicitors for the Appellant.

Orr Dignam & Co. Solicitors for the Respondent.

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Appeal dismissed.

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FULL BENCH.

*Before Sir Hugh Walmsley, Knight, Judge, Mr. Justice C. C. Ghose,
Mr. Justice Suhrawardy, Mr. Justice B. B. Ghose, and
Mr. Justice Duval.*

BIDYADHAR BACHAR AND OTHERS

v.

MANINDRA NATH DAS AND OTHERS.*

Jurisdiction—Suit for possession brought in Munsif's Court decreed—Mesne profits pendente lite, claim for—Amount of profits claimed or assessed exceeding Munsif's jurisdiction—Civil Procedure Code (Act V of 1908), O. 20, R. 12—Bengal, North Western Provinces and Assam Civil Courts Act (XII of 1887), Sec. 19.—Application for ascertainment of mesne profits, if a plaint.

Held by the Full Bench (Walmsley, J. dissenting): The Munsiff after passing a decree for possession in the proper exercise of his jurisdiction and also a preliminary decree for mesne profits, has jurisdiction to make a final decree in accordance with his decision. This jurisdiction is not limited, if, as a result of

*Full Bench Reference Nos. 2 of 1924, in Appeals from Orders Nos. 190 and 269 of 1923, by Suhrawardy and Duval J.J. on the 7th August 1924 from the decision of Babu Pashupati Bose, Subordinate Judge of Khulna, dated the 21st March, 1923.

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the inquiry directed by him, the mesne profits are found to exceed the amount of his pecuniary jurisdiction as regards the value of the suit.

Section 19 of Bengal, North Western Provinces and Assam Civil Courts Act and section 6 of the Civil Procedure Code have reference to the value of the suit for the purpose of entertaining jurisdiction.

The application for ascertainment of mesne profits is not a plaint.

The value of a suit in which the plaintiff claims recovery of possession of immovable property and also asks for mesne profits *pendente lite* is the value of the property. The plaintiff is not required to value even approximately the amount of mesne profits *pendente lite*.

When the value of the property is one thousand rupees or less, the plaintiff must bring his suit in the Munsiff's Court under the provisions of section 15 of the Code of Civil Procedure, and he cannot resort to a Court of higher grade with reference to any prospective mesne profits.

The forum of appeal is determined with reference to the value of the suit, and not the amount decreed.

Per Walmsley, J.: The Munsiff's jurisdiction in dealing with an application for ascertainment of mesne profits *pendente lite* remains subject to the pecuniary limitations contained in section 19 of the Bengal, North Western Provinces and Assam Civil Courts Act.

The mesne profits are not to be considered in determining the value of the suit for possession and deciding whether it has been brought before the right Court. When the mesne profits are ascertained, the Munsiff has jurisdiction to pass a decree to the full extent of his pecuniary limits for mesne profits *pendente lite* over and above the decree already passed for the property and mesne profits prior to institution.

The plaintiff after winning a decree for the land in the Munsiff's Court must bring a fresh suit for the ascertainment of mesne profits on the ground that the amount exceeds pecuniary jurisdiction of the Munsiff, which is entirely independent of the first suit, and that suit is liable to the ordinary law of limitation.

Appeals by the Plaintiffs.

Suits for recovery of possession of certain lands with mesne profits.

The material facts appear from the following reference to Full Bench.

Reference.

These two appeals arise out of two suits instituted by the plaintiff appellants in the Court of the Munsif for recovery of possession of certain lands with mesne profits. An order was passed against the plaintiff under section 145, Criminal Procedure Code, and the suits were instituted on 12th September 1911, for declaration of title. On the 20th February, 1914, the suits were decreed. The appeals to the lower appellate Court were dismissed on 12th June, 1915. There were second appeals to this Court by the

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defendant, which were also dismissed on the 21st August 1918. In the meantime, i.e. on 2nd December, 1915 plaintiff took possession of the decreed lands and after the appeal to this Court was disposed of, on the 27th February, 1919, applied to the Court of the Munsif which had passed the decree to ascertain mesne profits from the date of institution of the suit to the date of delivery of possession and to pass a decree for such amount as may be found due on enquiry. The plaintiff's applications really related to the ascertainment of mesne profits *pendente lite*, for he subsequently gave up his claim for antecedent mesne profits which was very small. In his applications the plaintiff valued his claim for mesne profits in one case at over Rs. 3,000 and in another case at Rs. 12,000. The amounts claimed being beyond the jurisdiction of the Munsif, he returned them for presentation to the proper Court. The plaintiff then filed the applications before the Subordinate Judge of Khulna, but the learned Judge following a certain decision of this Court registered the applications as new suits. In an elaborate judgment the Subordinate Judge held that the Munsif had jurisdiction to ascertain the mesne profits and pass a decree for any sum so ascertained, even though it might be beyond his pecuniary jurisdiction. The learned Subordinate Judge held that the proceedings before him could not be considered as continuation of the proceedings in the suit before the Munsif, and therefore the applications must be taken to have initiated fresh suits for the purpose of recovery of mesne profits. In that view he was of opinion that the statute of Limitation would apply whereas if the Munsif was to try the applications, no question of limitation could arise. The learned Subordinate Judge thereupon ordered that the plaints for ascertainment of mesne profits be returned to the plaintiff's pleader for being filed in the Munsif's Court within 30 days for disposal under order XX, rule 12, Civil Procedure Code. Against this order the plaintiff has appealed to this Court and it is argued that the Subordinate Judge has erred in holding that the Munsif's Court was the proper Court for ascertainment of the mesne profits and that the applications before the Subordinate Judge were affected by the law of limitation.

On the first question raised there has been divergence of opinion in this Court, and it is necessary to refer to the authorities briefly. In *Bhupendra Kumar Ghakrabarti v. Purna Chandra Bose* (1) it was held by Mookerjee and Teunon JJ., that a Munsif cannot entertain an application for investigation of mesne profits *pendente*

(1) (1910) I. L. R. 43 Calc. 650; 13 C. L. J. 132.

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life when the claim is laid at over Rs. 1000 and that the proper course for him to follow is to direct the return of the plaint, so far as it embodies a prayer for assessment of mesne profits from the date of institution of the suit to the date of delivery of possession, for presentation to the proper Court. A similar view was taken in the case of *Baikuntha Nath Kundu v. Mohananda Borat* (1). The facts of that case are similar to those of the present case. The suit there, as here, was instituted in the Court of the Munsiff and subsequently after the final decision by the High Court the plaintiff applied for ascertainment of mesne profits which he assessed at over Rs. 5,000. The Munsiff thereupon returned the plaint for presentation before the Subordinate Judge. On the defendant raising the plea of limitation, the Subordinate Judge held that under section 14 of the Limitation Act the claim was not barred. Against that decision the defendant appealed to this Court and the learned Judges decided that the order of the Subordinate Judge was correct in substance, as they were of opinion that the proceedings before the Subordinate Judge were in continuation of the suit before the Munsiff and were not affected by the statute of Limitation. The question argued in the present cases was not pointedly raised in that case but the learned Judges seem to be of opinion that the procedure followed was correct. A contrary view was taken in *Rameswar Mahton v. Dily Mahton* (2). There the suit valued at Rs. 950 was brought in the Munsiff's Court to recover possession of certain lands and for a decree for such mesne profits from the date of the institution of the suit to the date of the delivery of possession, as might be assessed in execution of the decree. The Munsiff made a decree in accordance with the prayer in the plaint. The plaintiff then asked that the mesne profits might be assessed and in his petition he roughly estimated them at Rs. 1,595. On an appeal the District Judge held that the Court of the Munsiff had no authority to determine the amount of mesne profits beyond its pecuniary jurisdiction and that the plaintiff could not recover more than Rs. 50 as mesne profits being the difference between the limit of the Munsiff's jurisdiction and the value of lands as given in the plaint. On an appeal to this Court, Ghose and Rampini JJ. held that the view taken by the lower appellate Court was erroneous and that the Munsiff had jurisdiction to ascertain the mesne profits and give effect to the order made in his decree in the suit notwithstanding that the amount of such mesne profits added to the value of the suit might come to a sum in excess of the pecuniary jurisdiction

(1) (1919) 24 C. W. N. 342.

(2) (1894) I. L. R. 21 Calc. 550.

of his Court. This case was followed by Brett and Sharfuddin JJ. in *Panchuram v. Kinoo* (1) In that case the amount of mesne profits ascertained by the Munsif was Rs. 1,630 in execution. On an objection taken by the judgment-debtor that the executing Court being a Munsif was not entitled to award mesne profits of a higher amount than Rs. 1,000, it was held that such Court had jurisdiction to award the mesne profits ascertained. The learned Judges tried to distinguish the case of *Bhupendra Kumar* (2) on the ground that the amount of mesne profits was ascertained in the case before them in the execution proceedings by a commissioner, but we fail to recognise how the principles of law laid down in these two cases can be reconciled. We are conscious of the alteration in the law made by the Civil Procedure Code of 1908, namely, that under the present Code mesne profits have to be ascertained in the suit whereas in the Code of 1882 the investigation was relegated to the execution department. We do not think that this difference in the procedure materially affects the principles of law underlying these decisions. The latter view has been accepted by the High Court of Madras in the Full Bench case of *Putta Kannayya v. Rudra Bhatta* (3) and by the Patna High Court in *Dina Nath Sahai v. Mussamat Mayawati Koor* (4). In the last case much stress has been laid on order XX, rule 12, Civil Procedure Code, 1908, which is construed as empowering the Court which passes the decree for recovery of land to make a decree for mesne profits irrespective of the amount being within or beyond its jurisdiction.

We have been unable to reconcile on principle the decisions of this Court in the cases to which we have referred and the result of these conflicting decisions is patent from the opposite courses adopted in this case by the Courts below, the Munsif choosing to follow the case of *Bhupendra Kumar* (2) and the Subordinate Judge preferring to follow the case of *Panchuram* (1).

There is also apparent conflict of views on the second point raised by the appellant. In *Bhupendra Kumar Chakravarty v. Purna Chandra* (2), the learned Judges ordered that the plaint, in so far as it embodies a claim for mesne profits from the institution of the suit to the delivery of possession would be returned to the plaintiff for presentation to the proper Court. In pursuance of this direction the plaintiff presented the plaint in the Court of the Subordinate Judge. The defendant took the plea of limitation and

(1) (1912) I. L. R. 40 Calc. 56.

(2) (1910) I. L. R. 43 Calc. 650 ; 13 C. L. J. 132.

(3) (1916) I. L. R. 40 Mad. 1.

(4) (1921) 6 Pat L. J. 34.

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and the matter came up again to the High Court and was heard by a Bench composed of Mookerjee and Beachcroft JJ.: *Bhupendra Kumar Chakravarty v Purna Chandra Bose* (1) (M.A. 118 of 1913), decided 25th February 1914). It was there held that the presentation of the plaint in the Court of the Subordinate Judge was tantamount to institution of a fresh suit which is affected by the law of limitation. A contrary view has been held without discussion in *Baikuntha Nath Kundu v. Mohananda Borat* (2).

The question raised in these cases is one of general importance and not infrequently comes up for decision before the Mofussil Courts which in the unsettled state of the law may come to different conclusions, as has been done in the present cases. We, therefore, think it desirable that the law on the points raised should be settled by a Full Bench. We accordingly refer the following questions for the decision of a Full Bench :

(i) Where a suit is brought in the Court of a Munsif for recovery of possession of land and mesne profits *pendente lite* are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsif, has the Munsif jurisdiction to fix such mesne profits and pass a decree for a sum beyond his pecuniary jurisdiction ?

(ii) If the above question is answered in the negative, does the presentation of the plaint, so far as it relates to the ascertainment of mesne profits, in the Court of the Subordinate Judge amount to the institution of a fresh suit which is affected by the law of limitation ?

Babu Mukund Behary Mullick for the Appellants : The Munsiff has no jurisdiction to pass a final decree in these cases for the following reasons: (A) *Jurisdiction* : Section 2(12) of the Code of Civil Procedure defines 'mesne profits.' The nature of decree to be passed in a suit for possession and for mesne profits is dealt with in order 20 rule 12 of the Code. A suit is to be brought under section 15 of the Code, in the Court of the lowest grade. Sections 18 and 19 of the Civil Courts Act (XII of 1887) treat of jurisdictions of Munsifs and Subordinate Judges and section 21, of appeals.

An application for investigation of mesne profits *pendente lite* cannot be entertained by the Munsif when the claim is above Rs. 1000 : *Bhupendra v. Purna* (3); *Golap Singh v. Indra Kumar* (4); *Baikuntha v. Mohananda* (2); *Jogneswar v. Suren-*

(1) (1914) 24 I. C. 232.

(2) (1919) 24 C. W. N. 342

(3) (1910) 13 C L. J. 132.

(4) (1909) 9 C. L. J. 367

dra (1); and *Hirjibhai v. Jamshedji* (2); *Hiramati v. Annada* (3); A contrary view was taken in the following cases: *Rameswar v. Dilu* (4); *Madho Das v. Ramji* (5); *Arogya v. Appachi* (6); *Putta Kannayya v. Rudra Bhatta* (7); *Sheikh Mahammad v. Mahtab* (8) and *Dina Nath v. Mayawati* (9). In the last case Doss J. held that the word 'Court' in O. 20 R. 12 of the Code meant the Court which passed the decree and thus special jurisdiction was given to the Munsif to try such cases.

(B) *Causes of action different*: Separate suits are maintainable in respect of claim for mesne profits and claim for recovery of possession of immovable property; claims are distinct: *Lalessor v. Janki* (10), which was followed in *Ponnammal v. Ramamirda* (11). In *Sheo Kumar v. Narain Das* (12), it was held that a summary suit for possession under section 9 of the Specific Relief Act was no bar to a suit to recover mesne profits for the time during which the plaintiff was out of possession. A contrary view was taken in *Mewa Kuar v. Banarsi* (13).

(C) *Value of suit*: The value of suit depends not merely upon the value of the property sought to be recovered, but also upon the value or amount of the profits recoverable: *Mohini v. Satis* (14) and *Bhupendra v. Purna* (15).

(D) *Forum of appeal*: The *forum* of appeal is determined by the value put upon the plaint: *Boidya Nath v. Makhan Lal* (16). The amount found by Court to be due for mesne profits is the value of the original suit for determining the *forum* of appeal: *Gulab v. Abdul* (17), approved by Full Bench in *Ijjatulla v. Chandra* (18).

Under the Code of 1882, the determination of mesne profits *pendente lite* formed the subject matter in execution proceedings and appeals lay under section 244. They were appeals from orders and as such were filed with court-fee stamps of eight annas in the District Court, and with Rs. 2 court-fee stamps in the High Court. Under the present Code, appeals are from decrees and *ad valorem* court-fees are paid.

Order 20 rule 12 of the Code of Civil Procedure says: "the Court may direct an enquiry as to mesne profits from the institution

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| (1) (1923) 38 C. L. J. 142. | (2) (1913) 15 Bom. L. R. 1021. |
| (3) (1916) 32 I. C. 788. | (4) (1854) I. L. R. 21 Calc. 550. |
| (5) (1894) I. L. R. 16 All. 286. | (6) (1901) I. L. R. 25 Mad. 543. |
| (7) (1916) I. L. R. 40 Mad. 1. | (8) (1917) 2 Pat. L. J. 394. |
| (9) (1921) 6 Pat. L. J. 54. | (10) (1892) I. L. R. 19 Calc. 615. |
| (11) (1914) I. L. R. 38 Mad. 829 F. B. ; 28 M. L. J. 127 F. B. | |
| (12) (1902) I. L. R. 24 All. 501. | (13) (1895) I. L. R. 17 All. 533. |
| (14) (1890) I. L. R. 17 Calc. 704. | |
| (15) 5(1910) I. L. R. 43 Calc. 650 ; 13 C. L. J. 132. | |
| (16) (1890) I. L. R. 17 Calc. 680. | (17) (1904) I. L. R. 31 Calc. 365. |
| (18) (1907) I. L. R. 34 Calc. 954 F. B. ; 6 C. L. J. 255 F. B. | |

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of the suit until the expiration of three years from the date of the decree whichever event first occurs." There is no authority for holding that the Court means the Court which decided the title suit. Decree means the final decree in the suit: *Bhup Indar v. Bijai Bahadur* (1).

The suits as filed in the Court of the Subordinate Judge were not barred by limitation: In *Puran Chand v. Roy Radha Kishen* (2) it was held that neither article 178 nor article 179, Sch. II of the Limitation Act of 1877 (corresponding to article 181 or article 182, schedule I of the Limitation Act of 1908) was applicable to ascertain the amount of mesne profits awarded by the decree. This case was followed in *Baikuntha v. Mohananda* (3), the facts of that case being similar to the present cases.

(2) The cause of action accrues at the date of the institution of suit when the mesne profits accrued: Article 109, Sch. I of the Limitation Act. As regards mesne profits *pendente lite*, limitation runs from every moment the true owner is kept out of possession of land.

Section 14 of the Limitation Act applies in such cases. There are *bona fide* prosecution of suits. After possession, a suit for mesne profits *pendente lite* is a new suit.

[C. C. Ghose, J.—Do you say that it is a new suit or a separate suit?]

It is a *new* suit because after obtaining possession after the decree in the title suit, it is possible for the plaintiff to ascertain the true position, as regards the valuation and the jurisdiction of the Court. Order 7 rule 2 Civil Procedure Code says that the plaintiff must value his claims even approximately. It is a continuation because it is the title suit and the final decree made in it that settles the exact position of the parties. If there was no appeal, the first Court's decree settles the position.

The first question should therefore be answered in the negative and the second question does not arise; or in any view, of the matter, if it does arise, regard being had to the facts of the present case, it should be answered in the affirmative and it should be held that the claim is not barred by limitation.

Dr. Jadu Nath Kanjilal (with him *Babu Benode Lal Mookerjee*) for the Respondents: As regards first point, agreed with the appellants and submitted that a negative answer should be given to the first question.

(1) (1920) 1. L. R. 23 All. 152 P. C.; L. R. 27 1. A. 109.

(2) (1891) 1. L. R. 19 Calc. 132 F. B.

(3) (1919) 24 C. W. N. 342.

[*C. G. Ghose, J.*—Do I understand you to say that you agree with Mr. Mullick in reading order XX Rule 12 Civil Procedure Code ?]

Yes ; but in a restricted sense.

If Munsif has jurisdiction to determine mesne profits irrespective of the amount, then no question of limitation arises.

If Munsif has no jurisdiction, then it is a new suit and it is barred by limitation.

Order XX rule 12 (1) & (iii) Civil Procedure Code says, "whichever event occurs first." Possessions was delivered in December 1915 and the applications was made in February, 1919. Article 109 Limitation Act applies. Subordinate Judge says, that there was defect of jurisdiction in the institution of the original title suit and no case under section 14 Limitation Act has been made out.

[*B. B. Ghose, J.* :—But plaintiff's right to mesne profits accrues with the final decision made by the High Court.]

[*Suhrawardy, J.* :—Decree means the final decree in the case. Order XX Rule 12 Civil Procedure Code says that time runs from the date of possession. No time is mentioned within which this should be done. The facts in the present case are similar to those of *Baikuntha v. Mohananda* (1).]

Section 14 Limitation Act mentions good faith. In this case the Subordinate Judge finds that there is no evidence to show good faith : *Jogneswar v. Surendra* (2) only speaks of jurisdiction. In *Bhupendra v. Purna* (3) (Mookerjee and Beachcroft JJ. clearly lay down that it is a new suit governed by article 109 schedule I of the Limitation Act.

Babu Mukunda Behary Mullick, for the appellants, in reply.

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The following judgments were delivered :

Walmsley J. :—The facts which have given rise to this reference have been fully set out by the learned Judges who made the reference. It is only necessary to mention the more important of those facts. They are that the two suits were instituted in the Munsiff's Court on September 12, 1911, and decreed on February 20th, 1914 and that possession was delivered to the plaintiffs on December 2, 1915. The suits were for recovery of possession on declaration of title, and the relief was valued at a sum within the Munsiff's pecuniary jurisdiction. After the defendants had exhausted their rights of appeal without success the plaintiffs applied to the Munsiff for the ascertainment of mesne profits, claiming 3000 Rs. in one

(1) (1919) 24 G. W. N. 342.

(3) (1914) 24 I. C. 232.

(2) (1923) 38 C. L. J. 142.

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suit and 12,000 Rs. in the other. The applications as first presented were for mesne profits *ante litem motam* and *pendente lite*, but the former were withdrawn, so that the applications are for mesne profits *pendente lite*, that is to say, for a period a little over four years.

The Munsiff held that he had not jurisdiction to entertain the applications. The Subordinate Judge held that the Munsiff had jurisdiction, and that in his own Court the applications must be treated as new suits affected by the law of limitation.

The questions referred to us are these :—

(I) Where a suit is brought in the Court of a Munsiff for recovery of possession of land and mesne profits *pendente lite* are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsiff has the Munsiff jurisdiction to fix such mesne profits and pass a decree beyond his pecuniary jurisdiction.

(II) If the above question is answered in the negative, does the presentation of the plaint, so far as it relates to the ascertainment of mesne profits, in the Court of the Subordinate Judge amount to the institution of a fresh suit which is affected by the law of limitation ?

It is unfortunate that the learned vakils who appeared before us were agreed in proposing a negative answer to the first question : they have however assisted us by placing before us all the leading decisions on the matter.

Act XII of 1887 is the statute which defines the powers of civil Courts in Bengal. In section 19 the jurisdiction of a Munsif is set out in these words. "Save as aforesaid (i.e., otherwise provided by any enactment for the time being in force) the jurisdiction of a Munsif extends to all like suits (i. e. original suits for the time being cognizable by civil Courts), of which the value does not exceed one thousand rupees." Then follow provisions about the forum of appeal. These rules are supplemented by the Civil Procedure Code, of which the fifteenth section enacts that every suit shall be instituted in the Court of lowest grade competent to try it. The sixth section may also be quoted "Save in so far as is otherwise expressly provided nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction."

If it were not for the views that have been expressed in various decisions I should have thought that the problem presented no difficulty. The pecuniary limits of a Munsiff's jurisdiction are

stated definitely, and there is no suggestion that circumstances may arise which will not merely enlarge those limits but even withdraw them altogether. Moreover the scheme of appeals is complete and coherent if the limitations to a Munsiff's jurisdiction are invariable but it becomes full of inconsistencies if the proposition is admitted that the Munsiff can in certain circumstances exceed his ordinary pecuniary limits.

In my opinion the Munsiff's jurisdiction in dealing with an application for the ascertainment of mesne profits *pendente lite* remains subject to the pecuniary limitations contained in section 19 of Act XII of 1887. I should like to add that there is no harshness in this view, for a plaintiff who values the land for which he sues at less than 1000 Rs., and the mesne profits derived from it during four years and a quarter at 12,000 Rs. stands self convicted, of either undervaluing the one or exaggerating the other.

There remains the question whether in determining the question of jurisdiction, the mesne profits *pendente lite* are to be added to the rest of the plaintiff's claim or treated separately. It is obvious that it is impossible for a plaintiff to make even an approximate guess at the mesne profits that may accrue before his suit is determined. Further those prospective mesne profits are not part of the cause of action on which his suit is brought. I hold therefore that they are not to be considered in determining the value of the suit, and deciding whether it has been brought before the right Court. If mesne profits *pendente lite* are not to be considered for those purposes it follows, I think, that when they are ascertained, the Munsiff will have jurisdiction to pass a decree to the full extent of his pecuniary limits for mesne profits *pendente lite* over and above the decree already passed for the property and mesne profits prior to institution. This view I think is in accordance with the provisions of order XX, rule 12 which clearly contemplates two decrees. It does not assist the plaintiffs in these cases, however, and I have mentioned it only to provide against misunderstanding. My answer to the first question therefore is in the negative.

Next we have to consider what is the result if a plaintiff after winning a decree for the land in the Munsiff's Court thereafter applies to a higher Court for the ascertainment of mesne profits on the footing that the amount exceeds the Munsiff's pecuniary jurisdiction. It appears to me that the question admits of a very simple answer. If a plaintiff forsakes the Court which passed the original decree for possession, he deliberately gives up his right to ask for the

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enquiry mentioned in sub-clause (c) of clause (1) of rule 12 of order XX, and the final decree mentioned in clause (2) and giving up his right to those special forms of relief he must bring a fresh suit, entirely independent of the first suit, and that suit must be liable to the ordinary law of limitation.

My answer to the second question is therefore is the affirmative.

C. C. Ghose, J :—I have had the advantage of reading the judgment which my learned brother Mr. Justice B. B. Ghose has prepared and I agree with him in the view which he has taken.

Suhrawardy, J : I also agree in the judgment about to be delivered by my learned brother Mr. Justice B. B. Ghose.

B. B. Ghose, J : Two questions have been referred to us by the Divisional Court. The second question arises only if the first is answered in the negative. The first question is therefore the more important of the two. It runs thus :—

"Where a suit is brought in the Court of a Munsiff for recovery of possession of land and mesne profits *pendente lite* are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsiff has the Munsiff jurisdiction to fix such mesne profits and pass a decree for a sum beyond his pecuniary jurisdiction.

The facts of the cases which have given rise to the question are fully stated in the order of reference and it is unnecessary to restate them here.

It is somewhat to be regretted that we have not received much assistance in this matter from the arguments at the bar, as both sides agreed in the contention that the first question should be answered in the negative. They only addressed us on the question of limitation with reference to the second question. The agreement however of the parties is not decisive of the question, and we have to arrive at our own conclusion.

I do not propose to deal with the several cases having a bearing on the question as there is clearly a divergence of opinion. I shall endeavour to approach the matter with reference to the relevant sections of the Bengal, North Western Provinces and Assam Civil Courts Act (XII of 1887) and sections and rules and orders of the Civil Procedure Code.

Section 19 (1) of Act XII of 1887 provides :—"Save as aforesaid, the jurisdiction of a Munsif extends to all like suits of which the value does not exceed one thousand rupees." For the present purpose it is not necessary to refer to section 18 or to sub-section

(2) of section 19 which extends the jurisdiction of some Munsiffs to Rs. 2000 and I shall assume that the jurisdiction of the Munsiff is limited to suits of the value of Rs. 1000. The first inquiry is, what is the value of a suit in which the plaintiff claims recovery of possession of immoveable property and also asks for mesne profits *pendente lite*? It must obviously be the value of the property. The plaintiff is not required nor is it possible for him to value even approximately the amount of mesne profits *pendente lite* which must vary according to the period of time the defendant retains possession of the property. Moreover, the plaintiff has no right to such mesne profits at the date of suit and he is only allowed such profits in his suit by virtue of a special provision in the Civil Procedure Code.

This provision has evidently been made with the object of prevention of a multiplicity of suits. When, therefore, the value of the property is one thousand rupees or less the plaintiff must bring his suit in the Munsiff's Court under the provisions of section 15 of the Civil Procedure Code, and he cannot resort to a Court of higher grade with reference to any prospective mesne profits. The Munsiff has then full jurisdiction to entertain the suit having regard to its value, under section 19 of Act XII of 1887. The next question is, whether such jurisdiction is limited or affected in any way by any subsequent event. Under order 20, rule 12 (1) clause (2) of the Civil Procedure Code, the Court may pass a decree in such a suit as this for possession of the property and under clause (c), a decree directing an inquiry as to mesne profits from the institution of the suit to a specified date which I need not reproduce here. Sub-rule (2) of rule 12 provides that where an inquiry is directed under clause (c) a final decree in respect of the mesne profits shall be passed in accordance with the result of such inquiry. Where the Munsiff has in the proper exercise of his jurisdiction passed a decree for possession and also a preliminary decree for mesne profits, he must, I think, be held to have jurisdiction to make a final decree in accordance with his decision. This jurisdiction is not limited, if, as a result of the inquiry directed by him, the mesne profits are found to exceed the amount of his pecuniary jurisdiction as regards the value of the suit. The final decree for mesne profits must therefore be passed for the amount found on inquiry. It seems to me that section 19 of Act XII of 1887 and section 6 of the Civil Procedure Code have reference to the value of the suit for the purpose of entertaining jurisdiction, and if the value of the suit is in excess of his jurisdiction he cannot

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entertain it nor pass any decree in the suit. If a suit is rightly entertained as within the jurisdiction of the Munsiff and a decree passed, his power to grant the proper and adequate relief is not affected by any event which increases the value of the relief during the pendency of the suit. To hold that jurisdiction should depend on the amount for which the final decree should be passed would have this effect, that after the Munsiff passes a preliminary decree and it is found after accounts taken the final decree must be for an amount exceeding the pecuniary limit of his jurisdiction, the entire proceedings before him including the decree passed should be considered as being without jurisdiction. It would also lead to many other anomalies apart from the serious question that the plaintiff would be denied his proper remedy for no fault of his. If the Munsiff's jurisdiction to pass a decree is limited to the value of the suit he can entertain, he cannot pass any decree for mesne profits the amount of which being added to the value of the property would exceed his pecuniary jurisdiction. Thus, where the property was valued at, say, Rs. 1000, the Munsiff will not be able to pass a decree for mesne profits for any further amount. I venture to think that it would not be a proper solution to hold that the Munsiff could pass a decree for mesne profits for a further sum of Rs. 1000 for although there must be two decrees in such a case there is only one suit, and the munsiff would then have power to pass a decree of the value of Rs. 2000 in the same suit. Moreover if the amount of the mesne profits were taken into account in determining the value of the suit and the munsiff's jurisdiction, then, in the case I have stated, he should be considered to have no jurisdiction to entertain the suit or pass any decree, and therefore the decree for possession as well as the preliminary decree for mesne profits should be held to have been passed without jurisdiction. This result however cannot at all be contemplated. Nor can it be said that the plaintiff must be considered to have abandoned a part of his claim by bringing his suit in a Court of limited jurisdiction. I have already shown that the plaintiff had no option in the matter and he had no right to bring his suit in a Court of higher grade with reference to prospective mesne profits, and it would be manifestly wrong not to allow him a decree for what he would be entitled to. The Court must have jurisdiction either to grant the relief a party is entitled to or not, and in the latter case it must stay its hand and cannot grant only a partial relief by assuming jurisdiction. I am therefore of opinion that if a suit is rightly entertained by a Munsiff he has the power to pass a decree for the proper

relief even where the amount of the decree exceeds the value of the suit and his pecuniary jurisdiction.

Several instances may be cited where the decree of the Munsiff may exceed the limit of his pecuniary jurisdiction as to the value of the suit he may entertain. A suit on a mortgage, where the mortgage money does not exceed Rs. 1000 at the date of a suit must be brought in the Munsiff's Court. He passes a decree for subsequent interest from the date of suit until realization at the bond rate. The amount due on taking accounts may be found to exceed Rs. 1000. I do not think that it has ever been doubted that the Munsiff could pass a final decree for the amount due to the plaintiff on taking such accounts. Again, where a successful party seeks for relief by way of restitution he is prevented from bringing a suit under section 144 (2) of the Civil Procedure Code. But the costs, interests, damages, compensation and mesne profits allowed under section 144 (1) may well be conceived to exceed Rs. 1000 and can hardly be held that the relief must be restricted to that amount, being the pecuniary limits of the jurisdiction of the Munsiff. Such instances may be multiplied.

The only difficulty suggested in accepting the view I have stated is with regard to the forum of appeal if the Munsiff passes a decree exceeding Rs. 5000. An appeal from the decree of a Munsiff lies in all cases under section 21 (2) of Act XII of 1887 to the District Judge. But where the value of the original suit exceeds Rs. 5000 the appeal from a decree of the Subordinate Judge lies to the High Court. The forum of appeal is determined with reference to the value of the suit, and not the amount decreed. It may be that the legislature did not contemplate the circumstance that a decree by a Munsiff might exceed Rs. 5000 in value. But I do not think that the determination of the forum of appeal affects the question before us. For practical purposes this is negligible as the instances where the Munsiff would pass a decree for mesne profits exceeding Rs. 5000, much in excess of the capitalized value of the property, must be very rare.

I have refrained from making any allusion to the fact of plaintiff's claiming mesne profits in his application for an inquiry at a figure in excess of the Munsiff's pecuniary jurisdiction. I consider the matter to be entirely irrelevant as the plaintiff is neither required nor bound to state any amount in his application. The figure stated in his application need not be taken into consideration at all in this connection. The application is not a plaint, and the contention of both parties that the plaint should be returned

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for presentation to a higher Court, as was held in some of the decided cases cannot be accepted for the reason, that a preliminary decree has already been passed in the case by the Munsiff on the original plaint, and the only thing that remains to be done is to give effect to the preliminary decree by a final decree. There is no provision in the law for the return of a plaint after a preliminary decree has been passed. To direct one suit to be converted into two suits would also cause mischief which order 20, rule 12 of the Code seeks to prevent.

On the grounds stated I would answer the first question in the affirmative. The second question does not therefore arise.

Duval J :—I agree with the judgment and conclusions of my learned brother Mr. Justice B. B. Ghose and wish only to add a few observations. In the absence of any rules to the contrary—rules which the Bengal Government is competent to make under section 3 (1) of the Suits Valuation Act—a suit for recovery of Khas possession of immoveable property must be valued for the purpose of jurisdiction under section 7 (v) (a) (E) or section 7 (XI) (cc) of the Court-Fees Act. The valuation may be, and in Bengal usually is, the market value of the property but it is not necessarily so; and in cases following under sub-clauses V (a) to (c) and VI (cc) may be far less. But whatever may be the actual annual income of the property, a plaintiff cannot value his suit for jurisdiction at a higher value than is allowable by law, i.e. the value of the land as calculated under section 7 of the Court-Fees Act plus the value of mesne profits claimed up to the date of the institution of the suit. He cannot value subsequent mesne profits in advance as he cannot tell when he will get his decree or when he will recover possession. The plaintiff must then bring his suit in the Munsiff's Court if its valuation does not exceed one thousand rupees. In my opinion once the Court of the Munsiff has jurisdiction to entertain a suit it must also have jurisdiction to give all the reliefs in that suit (including mesne profits and interest accruing after decree) which the law allows. Thus in a suit for money, section 34 of the Code provides that the Court may decree interest up to the date of realization and I do not think that it has ever been disputed that a Munsiff can give a decree for Rs. 1000 with costs and interest in addition, i.e., his jurisdiction is not limited in passing his decree to Rs. 1000 only. My learned brother has referred to a similar position in regard to mortgage suits.

It appears to me that order 20 rule 12 of the Code, taken as a whole and not split up into parts can only be interpreted to mean that the Court which has jurisdiction in the suit has power to give

all the reliefs specified in that rule, independent of what in the first instance is its pecuniary jurisdiction for entertaining the suit, and the fact that mesne profits, subsequent to the decree, of over Rs. 1000 are claimed can make no difference.

Nor do I find anything in the Bengal, Agra and Assam Civil Courts Act against this view. That Act limits the jurisdiction (usually) of Munsiffs to suits of the value of 1000, all suits above that value being triable by the Subordinate Judges. The District Judges hear all first appeals from decisions of Munsiffs and certain first appeals from the decisions of the Subordinate Judges, the High Court hearing other first appeals from the latter. But the respective jurisdictions of the High Court, the District Judges, the Subordinate Judges and the Munsiffs are determined not by the value of the decree, but by the value of the suit, and that value to my mind can only be the value of the suit as defined in the Suits Valuation Act read with the Court-Fees Act. Both section 19 and section 21 of the Bengal, Agra and Assam Civil Courts Act speak only of the value of the suit and not of the value of the decree—a value made up of what the Court finds due out of the claim and what under the Code of Civil Procedure are legal additions thereto e. g., costs, pleaders' fees and other subsequent reliefs such as mesne profits allowed by it.

The Court then passed the following order :

As the appeals out of which this reference has arisen are appeals from original orders they are remitted to the Division Court to be disposed of in accordance with the opinion of the majority of this Bench. That Court will also pass orders as to the costs of the hearing before this Bench.

According to the above direction of the Full Bench, the appeals from original orders No. 197 and 269 of 1923 were placed before Suhrawardy and Duval JJ. for final orders on 17-7-25 and their Lordships made the following order.

The appeals are dismissed with costs 2 gold mohurs in each case. we make no order as to costs for hearing before the Full Bench.

A. T. M.

Appeals dismissed.

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Manindra.

Duval, J.

July, 17.

APPELLATE CIVIL.

*Before Sir Ewart William Greaves, Knight, Judge, and
Mr. Justice Cuming.*

SURESH CHANDRA SAMADDAR AND OTHERS

v.

MATHURA NATH GAIN AND OTHERS.*

CIVIL.

1925.

April, 9.

*Landlord and tenant—Dispossession by landlord—Rent, if and when assessed
—Presumption of payment—Second appeal.*

Where a tenant being in possession of the whole demised area, was dispossessed from a portion thereof by his landlord, the latter is not entitled to sue for rent in respect of the whole or any portion thereof.

In the absence of any finding that the rent had been paid at the rate reserved in the *kabuliat* since the date of dispossession in the year 1902, no presumption can be made in second appeal that the rent had always been paid at this rate from the year 1902 : *Ram Narain v. Poolin* (1) distinguished.

Where a tenant has taken possession of a portion of the demised land but never has been put in possession of the whole, the Court fixes a rate of rent for the area taken possession of to be paid by the tenant on the ground that although he has contracted for the whole area he has elected to go into possession of a portion only of the area.

Where under circumstances over which the landlord had no control the tenant has not been given possession of the whole area, the Court decrees the rent in proportion to the area of the land of which the tenant has obtained possession.

Appeal by the Plaintiffs.

Suit for recovery of arrears of rent.

The material facts appear from the judgment.

Dr. Sarat Chandra Basak and *Babu Radhica Ranjan Guha*
for the Appellants.

Mr. Gunada Charan Sen and *Babu Someswar Prosad Mukerji*
for the Respondents.

The judgments of the Court were as follows :

Greaves J : This is an appeal by the plaintiffs against a deci-

*Appeal from Appellate Decree No. 2370 of 1922, against the decree of Babu Mohendra Nath Das, Officiating Subordinate Judge of Backergunj, dated the 7th June, 1922, affirming that of Babu Lala Jogesh Chandra, Munsiff 3rd Court, of Pirojpur, dated the 23rd December, 1920.

(1) (1878) 2 C. L. R. 5.

April, 9.

sion of the Additional Subordinate Judge of Backerganj confirming a decision of the Munsiff of the 3rd Court of Perojpur. The plaintiff sued for rent for the years 1322 to 1325 under a lease dated the 5th March 1879 whereby in respect of the demised area of 8 bighas rent at the rate of Rs. 35 a year was reserved for the whole area comprised in the demise. The defence of the defendants was firstly, that the rent had been paid and secondly, that after the lease the plaintiffs in the year 1897 let out a portion of the land comprised in the demise of 1879 to other persons. Consequently, they contend, and the Courts have so found, that the defendants were dispossessed of roughly half of the demised area and they accordingly say that under these circumstances they are not liable to pay rent. Both the lower Courts have taken this view and have dismissed the suit.

Various arguments were urged before us on behalf of the appellants. Firstly it was stated that the rent had been paid by the defendants at the rate reserved in the *kabuliat* even after the dispossession at any rate, from the year 1902 when the Courts found that the dispossession had taken place, and accordingly, it is urged before us that it would be inequitable that we should now hold that the rent should remain in suspense because a portion of the originally demised area has been taken away from the defendants and we were referred, in support of this argument, to the case of *Ram Narain Chuckerbuty v. Poolin Behary Lall Singh* (1). In that case the Chief Justice in delivering the judgment of the Court held that as 24 years had elapsed since a portion of the demised area had been taken away and the rent during that period had been paid at the old rate the Court would assume that there had been some arrangement in spite of the decrease of area and that the rent should be paid at the old rate. It is noticeable in that case that dispossession was not due to the direct act of the landlord but to the fact that a portion of the land was taken for the construction of a Railway. But in any case we do not think that it is possible for us to act on this view for there is no finding by either of the Courts below that the rent had been paid at the rate reserved by the *kabuliat* since the date of dispossession in the year 1902 and in the absence of such a finding we do not think that we should be justified in presuming in second appeal that the rent had always been paid at this rate from the year 1902.

Then it was contended on the basis of certain decisions to which we were referred that in any case there should not be suspension of

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the whole rent but merely an abatement of rent corresponding to the area by which the tenancy has been diminished and we have been referred to numerous cases. We think broadly that the decisions lay down, that where a tenant has never been put in possession of the whole area comprised in the demise but has taken possession of a portion thereof the Courts have fixed a rate of rent for the area taken possession of, to be paid by the tenant on the ground that although he has contracted for the whole area he has elected to go into possession of a portion only of the area. And where under circumstances over which the landlord had no control the tenant has not been given possession of the whole area the Courts have decreed the rent in proportion to the area of the land of which the tenant has obtained possession. But we do not think that there is any case which has decided that where a tenant has been in possession of the whole demised area and subsequently has been deprived a portion thereof by the action of the landlord it is open to the landlord to come to Court and ask the Court to fix a rent for the portion of the area which remains in the possession of the tenant. We think that in all such cases the Courts have held that the landlord is not entitled after dispossessing the tenant from a portion of the demised area to sue for rent in respect of the whole or for any portion thereof.

In this view of the state of the law we think that the appeal must fail and that as the tenants have been dispossessed by the action of the landlord of a portion of the holding and as the rent is fixed for the whole holding and not at so much per bigha the landlord is not entitled either to the whole rent or to rent in proportion to the land which now remains in the possession of the tenants.

The appeal accordingly fails and is dismissed with costs.

Cuming, J.—I agree.

A. T. M.

Appeal dismissed.

*Before Sir Hugh Walmsley, Knight, Judge, and Mr. Justice
B. B. Ghose.*

• HAFEZ AHMED YAR KHAN

v.

DINA NATH SADHUKHAN AND ANOTHER.*

CIVIL.

1925.

May, 5.

Sale for arrears—No arrears—Arrears, when become due—Holding situated in Panchannagram—New notification under Revenue Sale Law (Act XI of 1859)—Limitation—Limitation Act (IX of 1908), Sch. I. Art. 12.—Revenue Sale Law, Sec. 33.

A sale of a holding situated in Dihi Panchannagram for arrears of rent for 1320 B. S. (corresponding to 14th April, 1913 to 13th April, 1914, in May 1913, is not valid, as the rent for 1320 was payable at the Collectorate on or before 28th June 1914 under the terms of the *kabuliat*, dated the 6th February, 1873; the new notification under schedule III of the Revenue Sale Law is not applicable to such an arrear.

The sale being a nullity, there is no need to set it aside and section 33 of the Revenue Sale Law and article 12, schedule I of the Limitation Act, are not applicable.

Appeal by Defendant No. 1.

Suit to set aside a sale of a holding situated in Dihi Panchannagram.

The material facts appear from the judgment.

Messrs. Mahendra Nath Ray, S. C. Mukerji and Babu Indu Bhusan Mukerjee for the Appellant.

Babus Baranashibashi Mukerjee and Someswar Prosad Mukerji for the Respondents.

The judgments of the Court were as follows :

Walmsley J.:—This appeal arises out of a sale of a holding situated in dihi Panchannagram. The plaintiff was the owner of a portion of the holding No. 166. The share of rent which he had to pay was Rs. 1-3-9 p. per annum. The *kabuliat* executed in respect of the whole holding No. 166 is dated the 6th February 1873. According to that, the tenant undertook to pay the agreed rent annually on or before the 28th day of June into the Collectorate. Now, it would be tedious to narrate the facts of the case of Haji Elahi Buksh which led to an alteration in the notification

May 5.

*Appeal from Original Decree No. 177 of 1922, against the decree of Babu Kunja Behari Biswas, Subordinate Judge, 2nd Court, of 24-Pergunnahs, dated the 26th April, 1922.

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Walmsley, J.

passed under section 3 of Act XI of 1859. It is enough to record the fact that there has been a change made. The question of what is the latest date has been considered by the learned Judge, but, for the present purpose, I think the only point which we have to consider is what was the date on which the rent of each year was payable to the Collector. It has been urged before us that the stipulation in the *kabuliat* means that the rent for 1320 B. S. would be payable by the tenant on the 28th of June 1913. That would be the interpretation which I should have placed on the *kabuliat* if it had stood by itself. But the plaintiff has been able to produce a *Jamawasilbaki* kept in the Collector's office containing entries of no less than six years and studying that *jamawasilbaki* I have come to the conclusion that it was the practice of the Collector to receive the rent of each Bengali year in May or June of the following year; that is to say, that the rent of 1320 B. S. would have been accepted if paid in May or June 1914. Now, if that was the practice, then I think it follows that the sale held by the Collector was not in accordance with law. The new notification under section 3 of Act XI cannot apply to the sale which is the subject matter of this suit; and, if the rent for 1320 was not due to be paid into the Collectorate until the 28th of June 1914, it follows by a reference to section 2 and the old notification that a sale held in the following May was not a good sale. The conclusion, therefore, to which I come is that the learned Judge of the Court below was right in holding as he did that the sale was not a good sale.

The other point which has been argued before us is one of limitation. It is said that the suit is really a suit to set aside a sale held under the provisions of Act XI (B. C) of 1859, and that, under section 33 of that Act, it should have been brought within one year of the date of the confirmation of the sale or, under Art. 12 of the Limitation Act, it should have been brought within one year again. The answer to that is that the sale was not a sale at all and, therefore, there was no need to bring in a suit to set it aside so that neither provision applies. The suit was brought within much less than 12 years of the date on which possession was given to the purchaser and consequently it is not barred by limitation.

In my opinion, the decision of the lower Court should be affirmed and this appeal dismissed with cost.

B. B. Ghose J : I agree,

A. T. M.

Appeal dismissed.

Before Mr. Justice Suhrawardy, and Mr. Justice Duval.

RAM CHANDRA AGARWALA AND ANOTHER.*

v.

SYAMESWARI DASIA.*

C. VII.

1925.

April, 30.

Lease—Construction—Erroneous admission by pleader.

A deed purported to be an agreement for letting out *Basa Bari* and a tin *Ghar* ran as follows: "You having come to me and Rs. 150 only having been fixed as the annual jama of the said *Basa Bari* and the tin *Ghar* I let out the same to you for carrying on your trade and commerce therein" Then followed a clause as to the way in which the expenses for repairs would be met. It then said "after the accounts have been made and the amount of money expended therefor totalled, there will be a fresh deed. On repayment of the debt the lessor will be able to make any new settlement of the land according to her wish." In the third paragraph there were certain other conditions such as the maintenance of boundaries, payment of damages for injuries to the *Ghar* not caused by accident, keeping the house in repair. If the lessor did not make the repair, the lessee would make it and deduct the expenses thereof from the rent reserved:

Held, that the document was a lease for a term of years and required to be stamped and registered.

An erroneous admission by a pleader on a point of law is of no effect and does not preclude a party from claiming his legal rights in the appellate Court: *Secretary of State v. Sibaprosad* (1).

Appeal by the Defendants.

Suit for ejectment.

The material facts appear from the judgment.

Dr. Bijan Kumar Mukerjee (for *Babu Rupendra Kumar Mitter*) and *Babu Dharmadas Set* for the Appellants.

Mr. Abani Nath Bhattacharjya and *Babu Nirod Bandhu Roy* for the Respondent.

The judgments of the Court were as follows:

Duval J: This appeal arises out of a suit in ejectment. The mother of the present plaintiff had a house in Gouripur Bazar in

April, 30.

Appeal from Appellate Decree No. 2684 of 1922 against the decree of *Babu R. N. Phukan*, Special Subordinate Judge of Assam Valley Districts, dated the 21st July, 1922, affirming that of *Babu P. Singh*, Munsiff of Dhubri, dated the 3rd December, 1921.

(1) (1917) 27 C. L. J. 447.

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Duval, J.

the District of Goalpara and in 1901 the defendants became her tenant at the rental of Rs. 90 a year and had a shop in the premises. In 1910 the house having been found to be dilapidated the parties met and it was arranged that the lease should continue at Rs. 150 a year after repairs but as the lady had no money the defendants would advance the money for putting the house in order without interest and that the money would be recovered by a deduction of Rs. 75 a year from the present rent of Rs. 150 a year. There was a further term that until the money due on the repairs was repaid the defendants would not be ejected. Shortly after this the mother of the plaintiff who was an old lady of 90 years of age died and has been succeeded by her daughter the present plaintiff. In 1920 the present suit was brought to eject the defendants from the house. The defendants set up a document (Ex C.) under which they stated they were not liable to be ejected until the whole debt had been paid off by payment of Rs. 75 a year. The Munsiff however found that this deed not having been registered, the defendants were not protected as they were only tenants at will and that as notice had been served, the tenancy had been terminated by that notice and so he gave a decree to the plaintiff to eject the defendants in payment of the balance due to the extent of Rs. 875 and allowed them a certain time within which to remove the additional houses. Against this order the defendants appealed. On the appeal coming up before the Subordinate Judge the learned pleader appearing for the appellant conceded that the position of his clients was that of the tenants at will and that they were liable to be ejected but in the circumstances of the case the amount of compensation granted by the Court below was inadequate. The learned Subordinate Judge therefore only dealt with the question of compensation and came to the conclusion that Rs. 875 allowed to the defendants was the proper amount.

In appeal before us it is first urged that this admission by the pleader for the defendants did not bar the point as to the validity or otherwise of the lease or whether the defendants are liable to be ejected at all being taken in second appeal. There is no doubt that this is so. I only refer to the case of *the Secretary of State for India in Council v. Sibaprosad Jana* (1), where it was stated following the decision of the Judicial Committee in the cases of *Tagore v. Tagore* (2); *Beni Pershad v. Dudhnath* (3), that an erroneous admission by a counsel on a point of law is of no effect and does not preclude a

(1) (1917) 27 C. L. J. 447.

(2) (1872) 18 W. R. 359; 9 B. L. R. 377.

(3) (1899) I. L. R. 27 Cal. 156.

party from claiming his legal rights in the appellate Court. The question of the amount of compensation is not argued before us in second appeal. The only question taken before us is that the document (Ex. C.) though not registered gave them a right under which they could not be ejected and anyhow it did not create a present demise and was only an agreement and not a lease : and that anyhow the principle laid down in the case of *Walsh v Lonsdale* (1), as to part performance will apply to this case. The question however in this case is whether as a matter of fact it was in consequence of this document as a lease that the defendants came into possession of this property. An examination of the document in my mind leaves no doubt in this respect. The document, began by describing the deed to be an agreement for letting out Basa Bari and a tin 'ghar' and it says as follows at the beginning "you having come to me and Rs. 150 only having been fixed as the annual jama of the said Basa Bari and the tin *ghar*, I let out the same to you for carrying on your trade and commerce therein". Then follows a clause in the document as to the way in which the expenses for repairs would be met. It then lays down that after the accounts have been made and the amount of money extended therefor totalled, there would be a fresh deed. It also says that on re-payment of the debt the plaintiff will be able to make any new settlement of the land according to her wish. In the 3rd. paragraph there are certain other conditions such as, to the maintenance of boundaries, payment of damages for injuries to the Ghar not caused by accident, keeping the house in repair (if the lessor does not make the repair the lessee will make it and deduct the expenses thereof from the rent reserved). This clearly shows that this document purports to be a lease : and if it was lease for a limited number of years and as the pleader for the appellant argues for 20 years, it required to be properly stamped and registered. This has not been done. In my opinion therefore the Munsiff's decision, which was affirmed by the Subordinate Judge, that the defendants were no more than tenants at will is correct. I would therefore dismiss the appeal with costs. In doing so however I will order that the defendants be given three months' time from the date of the decree of this Court within which to remove the additional house and give up the property on receipt of compensation. The rent due to the plaintiff up to the date of giving up of possession will be set off against the compensation.

Suhrawardy J. : I agree.

A. T. M.

(1) (1882) 21 Ch. D. 9.

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1925.

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v.

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Duval, J.

Appeal dismissed.

*Before Sir Ewart William Greaves, Knight, Judge, and
Mr. Justice M. N. Mukerji.*

Civil.

1923.

May, 26.

MOHAMMED USMAN

v.

ABDUL RAHAMAN AND OTHERS.*

Mortgage by conditional sale—Document, construction of—Evidence as to subsequent conduct of parties—Intrinsic evidence—Omission as to date of payment—Omission as to right to redeem.

Intrinsic evidence afforded by the terms of a document is to be taken into consideration in its construction. The Court also takes into consideration the facts which may legitimately be proved with a view to showing in what manner the language of the document was related to the existing facts and may also refer to the contrast between the value of the property and the consideration that passed in money: *Abdul Goffur v. Sheikh Jamal* (1) and *Raja Narasingerji v. Raja Panuganti* (2).

Evidence relating to subsequent conduct of parties themselves as showing their intention, is inadmissible in a case where no third parties are involved or no question of fraud arises: *Maung Kyin v. Ma Shwe La* (3).

An omission as to the date within which the money is to be repaid, would not indicate the real character of the document and it is no indication that the deed is not one of mortgage: *Abdul Goffur v. Sheikh Jamal* (1).

The absence in a document of any reservation to the purchaser of the right to recover his purchase money or of a stipulation authorising the grantor to sue for redemption, is not always a safe criterion for the determination of the question whether it is a deed of conditional mortgage or of sale.

On construing the document in the present case, in which the parties were Mahomedans:

Held, that inadequacy of price coupled with the mention in the deed about the need of money on the part of the vendor, and the stipulation as to return of the purchase price to the vendee and the reconveyance of the property indicated that the document was intended to be one of mortgage by conditional sale.

* Appeal by the Plaintiff.

Suit for redemption of mortgage.

The material facts appear from the judgment of Mukerji, J.

*Appeal from Appellate Decree No. 865 of 1923, against the decree of Babu Ram Chandra Banerjee, Subordinate Judge, 1st Court, of Sylhet, dated the 8th January, 1923, reversing that of Babu Kisor Lal Chatterjee, Munsiff, and Court, at Sylhet, dated the 20th March, 1922.

(1) (1913) 18 C. L. J. 228.

(2) (1924) 40 C. L. J. 481.

(3) (1917) 27 C. L. J. 175; 22 C. W. N. 257.

Babu Satyendra Kishore Ghose for the Appellant.

Mr. Gopal Chandra Das and *Babu Nirod Bandhu Roy* for the Respondents.

The judgments of the Court were as follows :

Mukerji J :—The question raised in this appeal is as to the true construction of a document dated the 26th Jaistha, 1308 B. E. The Courts below differed in construing the document, the Court of first instance holding that it was a mortgage by way of conditional sale and the lower appellate Court being of opinion that it was a deed of out and out sale. The document runs in these words "I have been in the ownership and possession of land fit for erection of shops by right of my purchase within the boundaries mentioned below situated in the line to the north of the road facing westward in Bander Bazar Chak. Now for my own necessity on receipt from you Rs. 400 in cash as the price of that shop land I sell to you the same and I and my descendants cease to have right therein. You from this day being in ownership and possession in these lands, continue to enjoy the same with the rights of transfer by gift and sale etc. I and my successors cease to have any right thereto. I make over my *kobala* of purchase dated the 11th Sravan, 1287. Moreover when I or my heirs would return the purchase price to you and your heirs you shall give up the properties. And I shall get this *kobala* registered within the period of limitation." There is a further stipulation in the document which runs in these words "Moreover if I pay you back the said price of Rs. 400 then you will without any objection give up the lands sold and return the connected deeds etc. I shall seek the protection of Court if you do not return the same." In construing the document in the present case it should be remembered that the transaction was between parties who were Mahomedans and it is well known that documents are executed by Mahomedans in which they conceal or at least try to conceal the real nature of the transaction and attempt to make out that the transaction is an out and out sale, although as a matter of fact the intention of the parties was to create a mortgage. The learned Subordinate Judge was of opinion that the deed was one of out and out sale. He relied upon certain pieces of evidence which is evidence relating to the subsequent conduct of the parties themselves as showing their intention. This evidence has been laid down by the Judicial Committee in the case of *Maung Kyin v. Ma Shwe La* (1) as not admissible in a case where

(1) (1917) 27 C. L. J. 175 ; 22 C. W. N. 257.

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no third parties are involved or no question of fraud arises. In order to construe the document intrinsic evidence afforded by the terms of the document has to be taken into consideration and the Court has also to take into consideration the facts which may legitimately be proved with a view to showing in what manner the language of the document was related to the existing facts and may also refer to the contrast between the value of the property and the consideration that passed in money. These principles have been laid down by this Court in the case of *Abdul Goffur v. Sheikh Jamal* (1) and also by the Judicial Committee in the very recent case of *Raja Narasingerji v. Raja Panuganti* (2).

So far as the first of these elements is concerned, namely, the adequacy or otherwise of the consideration of the transaction there is no discussion of it in the judgment of the learned Subordinate Judge, while in the judgment of the learned Munsiff it appears that the consideration mentioned in the document was Rs. 400 whereas the executant of the document had purchased it for Rs. 600 long before the date of the document in question. This clearly shows that the consideration was wholly inadequate. It was certainly one of the matters to be taken into consideration in determining the real character of the document. The learned Subordinate Judge in dealing with this question has referred to the decision of this Court in the case of *Kamini Kumar Chowdhury v. Latifunnessa Chowdhurani* (3). That decision affords us very little assistance inasmuch as we are not in a position to know exactly what the terms of the document in that case were.

The learned Subordinate Judge says that the document on the face of it purports to be a *kobala*, that the word 'sale' is clearly mentioned in the document and it is also stated in the document that the purchaser, his sons and grandsons are to enjoy the lands and the executant gives up his right and authorises the purchaser to transfer the same by sale or gift etc. These terms undoubtedly would go to show that the object of the executant was to make out that the document would purport to be one representing an out and out sale. But that is a matter of very little consequence if we take into consideration the fact that the document was executed between the Mahomedans and even if the real object of the parties was to create a mortgage they might conceal that intention by using terms and expressions of this description. The learned Subordinate Judge then goes on to say that there is absence in the document as to

(1) (1913) 18 C. L. J. 228.

(2) (1924) 40 C. L. J. 481.

(3) (1920) 24 C. W. N. Notes Portion Cl. XXV.

certain date within which the money was to be repaid. This omission, however, would not indicate that the deed was not one of mortgage, as will be seen from the decision of this Court to which I have already referred—the case of *Abdul Goffur v. Sheikh Jamal* (1). The document in that case provided that if ever the vendor or his sons or son's sons or other heirs paid up the price the vendee or his sons or his son's son or other heirs would be bound to reconvey the homestead. As was observed by Mr. Justice D. Chatterjee in that case whose decision was upheld on appeal by the Chief Justice Sir Lawrence Jenkins and Mr. Justice Mookerjee that if the term is indefinitely long it should be taken as indicating that an absolute sale was not meant. So the mere absence of the mention of a certain date is no indication as to the real character of the document. Then the learned Subordinate Judge says that there was no mutual agreement in the document for bringing a suit for redemption. But the absence of any reservation to the purchaser of the right to recover his purchase money or of a stipulation authorising the grantor to sue for redemption is not always a safe criterion for the determination of the question. The learned Subordinate Judge says that the executants parted with possession immediately after the execution of the document ; but it is usual in such cases to put the mortgagee in possession and set off the rents against the interest.

These are all the circumstances upon which reliance has been placed by the Subordinate Judge in arriving at the conclusion that the document was one of out and out sale. The learned Subordinate Judge says that the condition as to making over of the property on receipt of the price paid is at best a solatium to the vendor. What probably he means by this finding is that although there is a condition of repurchase attached to the sale which he thought was the real nature of the transaction that condition could not be given effect to in the absence of specific mention of the date by which the repurchase was to be made.

On the whole I am of opinion that the circumstances upon which the learned Subordinate Judge has relied for coming to this conclusion do not necessarily lead to the conclusion that the document was one of out and out sale. On the other hand the inadequacy of the price coupled with the mention in the deed about the need of money on the part of the vendor, and the stipulation as to return of the purchase price to the vendee and the reconveyance of the property indicate that the document was intended to be one of mortgage by way of conditional sale. I am there-

(1) (1913) 18 C. L. J. 228.

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fore of opinion that the decision of the learned Subordinate Judge with regard to the construction of this document is not right and that the Munsiff arrived at a proper decision on this point.

In this view of the matter, in my opinion, the judgment of the learned Subordinate Judge should be set aside and that of the learned Munsiff restored with costs of this Court as also of the Court of appeal below.

Greaves J :—I agree.

A. T. M.

Appeal allowed.

Before Mr. Justice Cuming and Mr. Justice Chakravarti.

BIDHUMUKHI AND OTHERS

v.

GOBINDA CHANDRA PAL.*

CIVIL.
 1925.
 May, 20.
 June, 8.

Lease—Homestead land—'Raiyat'—'Kaimi maurasi raiyat'—Estoppel.—Bengal Tenancy Act (VIII of 1885), Sec. 49.

A lessor is bound by the contract by which he agreed not to eject the lessee.

The word 'raiya' does not necessarily mean an agricultural tenant. It is often used in the mofusil in its wider sense as meaning a tenant in general.

A lessee of a piece of homestead land is ordinarily a tenant and not a raiyat.

The expression 'Kaimi maurasi raiyat' in a lease of homestead land means a permanent heritable tenancy of homestead land.

A sub-lease held under a permanent tenant of a homestead land, does not come under section 49 of the Bengal Tenancy Act.

Even assuming that the lessor in the present case was 'a kaimi maurasi raiyat' he was estopped from showing that he was a raiyat with right of occupancy or that the lessee was an under-raiyat and that the agreement not to eject was invalid : *Chandra Kanta v. Amjad Ali* (1).

Appeal by the Defendants.

Suit for ejectment.

*Appeal from Appellate Decree No. 1647 of 1923, against the decree of E. Milsom Esq, District Judge of Noakhali, dated the 5th March, 1923, affirming that of Babu Sarat Chandra Dey, Munsiff, 1st Court, of Lakhmipur, dated the 29th November, 1920.

(1) (1920) 32 C. L. J. 296 ; 25 C. W. N. 4.

The material facts appear from the judgment of Chakravarti, J.

Babus Ramesh Chandra Sen and Jitendra Kumar Sen Gupta
for the Appellants.

Mr. Gunada Charan Sen and Babu Nagendra Chandra Chaudhuri for the Respondent.

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The judgments of the Court were as follows :

Chakravarti J :—This is an appeal by the defendants and it arises out of a suit for Khas possession of certain lands by the plaintiff after service of notice under section 49 of the Bengal Tenancy Act. The plaintiff stated that the defendants took an underraiyati lease from them in 1293 of 1 kani of land for a term of 9 years and that the plaintiff on the expiration of the term of the lease served a notice upon the defendants under section 49 of the Bengal Tenancy Act and that the defendants having refused to vacate the lands this suit is brought for khas possession of the land covered by the under-rayati lease of the defendants.

The defence of the defendants was that they were the owners of *kayemi mourasi* tenancy of the homestead of one Jagamohun Bhuiya measuring about 2 kanis of lands and that in 1293 the defendants sold the same to the plaintiff and on that very day they took a sub-lease by a registered *patta* from the plaintiff of a portion of the land sold by them to the plaintiff which was their own homestead comprising an area of 1 kani at a rent of Rs. 16 a year which was fixed for 9 years and that it was agreed by the plaintiff in that lease that the defendants shall never be liable to ejectment by the landlord. The defendants further alleged that the tenancy sold by them to the plaintiff was a permanent leasehold interest in homestead land containing building, tanks, garden, etc., and the plaintiff described his own right in the sub-lease as that of "a *kayemi mourasi raiyat*" and in that capacity he granted the sub-lease to the defendants and therefore the plaintiff was estopped from showing that he was merely an occupancy raiyat and further that the Bengal Tenancy Act did not govern this case.

The learned Munsiff held that the plaintiff was a raiyat with right of occupancy and that the defendants were under-raiyats and therefore the plaintiff was entitled to eject the defendants after service of notice under section 49 of the Bengal Tenancy Act, which he found was duly served on the defendants. The trial Court decreed the plaintiff's suit.

On appeal by the defendants the learned District Judge has

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affirmed the decree of the Court of first instance and against this decree the defendants have preferred this appeal.

The learned District Judge finds that in the entry in the record-of-rights the defendants were recorded as "settled raiyats under a raiyat" which is clearly impossible.

The learned Judge held the entry in the record-of-rights that the defendants were under-raiyats with a right of occupancy is of no avail to them because, they have failed to adduce any evidence that there was a local custom to the effect that under-raiyats could acquire a right of occupancy.

The learned District Judge further held that the plaintiff was not estopped from showing that he was a raiyat with right of occupancy. In this view he held that the decision of the Full Bench in the case of *Chandra Kanta Nath v. Amjad Ali Hazi* (1) was applicable to this case and that the decree made by the trial Court was correct and dismissed the appeal.

In this second appeal the learned vakil for the appellants raised the following points :—

Firstly :—That the learned District Judge was in error in holding that the entry of the record-of-rights was as stated by him and this mistake has vitiated his judgment.

Secondly :—That the description of the landlord in the lease of 1293 that they were "kaimi mourashi ryot" did not mean that they were raiyats with right of occupancy but it meant that the plaintiff had a permanent and heritable tenancy in the land ; the word 'ryot' meant a tenant and not an agricultural raiyat as the lease was evidently of Bastu land, namely the homestead of Jogu Mohan Bhuiya.

Thirdly :—That the plaintiff was estopped from alleging that he was merely an occupancy raiyat and not the holder of a permanent heritable tenancy of Bastu lands.

Fourthly :—That the entry in the record-of-rights was that the under-raiyati of the defendants was with right of occupancy and that the onus of proof shewing the contrary lay on the plaintiff and not upon the defendants as was erroneously held by the learned District Judge.

Fifthly :—That the Bengal Tenancy Act did not apply to this case and that a notice under section 49 of the Bengal Tenancy Act did not terminate the tenancy and therefore the plaintiff had no right to eject the defendants.

(1) (1920) 32 C. L. J. 296 ; 25 C. W. N. 4.

Sixthly : That in the circumstances of the case the defendants were entitled to claim for the lands which was their homestead, the benefit of section 182 of the Bengal Tenancy Act.

As to the first point, Mr Sên who appeared for the respondent very frankly admitted that the learned Judge misread the entry in the record of rights. I shall deal with the question as to the effect of the entry in the record of rights when correctly read.

It is undisputed that the lessor is bound by the contract which he made and by which he agreed not to eject the tenants unless he can show that the contract is invalid in law. He seeks to do so by alleging that the lease on the face of it shews that the right of the lessor was that of an occupancy raiyat and therefore a sub-lease for more than 9 years is void.

The first question therefore which requires consideration is as to what was the status of the landlord and does the lease on the face of it shew that the lessor was an occupancy raiyat.

The lease does not contain any indication that the lease was for agricultural land and the lease was for agricultural purposes. The entire area of the land was described as the homestead of Jaga Mohan Bhuiya consisting of and comprising "Garden, Road, Gopat, *khil*, Chatan with tank and pond" and the 1 Cani let out to the defendants was described as the remaining 1 kani of land comprising the *bhita* garden, pathway, Gopat, *khil chatan*, ditches and tank appertaining to your residential homestead."

The lessor described his right to quote the words of the lease (কায়মী মৌরাসী রায়তি) (Kaimi maurasi raiyati) in the homestead of Jaga Mohan Bhuiya and a sub-lease of the homestead of the vendor was granted by the sub-lease of 1293. The words Kaimi Mourashi are quite appropriate when used with respect to a permanent Jama of a piece of homestead land. The only justification for calling this as an agricultural lease is the use of the word raiyat (রায়ত). "The word raiyat (রায়ত) does not necessarily mean an agricultural tenant. It is often used in the mofussil in its wider sense of meaning a tenant in general. If the word is read with the context I think the word should be read to mean a tenant of homestead land. The lessee of a piece of homestead land is ordinarily a tenant and not a raiyat. The lease-hold interest described is of lands forming homestead and there is no indication in the lease that any cultural land was demised.

The description of "Kaimi Maurashi" applies very aptly to a non-agricultural tenancy. If the lands were agricultural or agricultural lease was intended the word occupancy raiyat so well known

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would have been used. I am therefore clearly of opinion that the lessor intended to put forward himself as the owner of a permanent heritable tenancy of a homestead land and in the face of the lease that is the only meaning which can be ascribed to the words. The plaintiff in my opinion has failed to show that the agreement not to eject the sub-tenant is invalid in law.

On the construction of the lease which I have put upon it, the plaintiff's case would fail because, the Bengal Tenancy Act will have no application to the sub-lease held by the defendants.

In the circumstances of this case it is not necessary to deal with all the points raised on behalf of the appellants.

Even assuming that the plaintiff was an occupancy raiyat I think that the principle laid down by the Full Bench if applied to this case, the plaintiff would be estopped from shewing that he was an occupancy raiyat, or that the defendants were under-raiyats and that the agreement not to eject the defendants was invalid.

The plaintiff in order to show that the estoppel does not arise must show that the sub-lease "on the face of it" was by an occupancy raiyat. As I have already pointed out, the lease described the right of the plaintiff as "Kaimi Mourashi" as distinguished from an occupancy raiyat. It is true that an occupancy right is also permanent and heritable. The lease shews that the lands were Bastu lands and therefore it cannot be said that the sub-lease on the face of it was one granted by an occupancy raiyat to an under-raiyat. The plaintiff is therefore estopped from shewing that the defendants were under-raiyats.

The learned District Judge, as I have already said, took an erroneous view of the entry in record-of-rights. He is also in error in saying that the onus of proving that the defendants acquired an occupancy right under a local custom, lay on them. The record of-rights is in their favour and it was for the plaintiff to rebut it.

We think therefore that the plaintiff is not entitled to eject the defendants and his suit must fail and is dismissed with costs in all Courts.

Cuming J :—I agree.

A. T. M.

Appeal allowed.

CRIMINAL REVISION.

Before Mr. Justice Suhrawardy, and Mr. Justice Panton.

MAKHAN MAPA.

v.

MONINDRA NATH BOSE AND OTHERS.*

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Cross cases—Trial.

As regards trial of cross cases, each case has to be decided according to its requirements.

It is not fair to force a person in the position of an accused to throw himself open to cross-examination by the other side.

A trial of cross cases of rioting was fixed for hearing on certain date, when some witnesses were examined in the case against the petitioner and the case in which the petitioner was the complainant was adjourned to a certain date. On the adjourned date, the Magistrate took up the case against the petitioner and also wanted to try the case in which the petitioner was the complainant. The petitioner prayed that the trial of his case might be adjourned till the disposal of the case against him.

Held, that for the ends of justice, the case against the petitioner should be disposed of first and then the petitioner's case, if he so wished, be taken up.

Application for Revision under section 435 of the Code of Criminal Procedure by the Petitioner.

The material facts appear from the judgment.

Mr. Narendra Kumar Basu and *Babu Jatindra Nath Sanyal* for the Petitioner.

Babu Santosh Kumar Bose for the Opposite Party.

Mr. Khondkar (Deputy Legal Remembrancer) for the Crown.

The judgment of the Court was as follows :

This Rule has been issued on two grounds ; first, why the case should not be transferred from the file of the Sub-Divisional officer, Diamond Harbour to the file of some other competent Magistrate, and, secondly, why the case in which the petitioner is the complainant should not be postponed pending the hearing of the case in which the petitioner is the accused.

With regard to the first ground, we have gone through all the

*Criminal Revision No. 267 of 1925, against the order of H. C. Chatterjee Esq., Additional District Magistrate, 24 Parganas, dated 30th March 1925 confirming the order of Rai R. C. Dutt Bahadur, Sub-divisional Officer of Diamond Harbour, dated 3rd March 1925.

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papers in connection with this litigation which has been hanging for a long time mainly on account of the conduct of the petitioner and we do not think that any ground has been made out for our interference on that ground. The allegations made against the trying Magistrate have all been denied; and there is one fact which makes it undesirable that the case should be transferred from the file of the Sub-Divisional Officer. An application was made previously to this Court for the transfer of the case in which the petitioner is the accused from the file of the Sub-Divisional officer. That application was refused with the result that the case against the petitioner will be tried and is being tried by the Sub-Divisional Officer. It will not be desirable that the case in which the petitioner is the complainant should be tried by another Magistrate.

With regard to the second ground there have been several decisions of this Court which cannot at first sight be easily reconciled. The petitioner and the opposite party have been fighting over a piece of land. There was fight between them on the 22nd November 1924. The opposite party lodged a complaint on that day before the Kulpi Police charging the petitioner and his men with rioting and causing grievous hurt. On the 25th November, 1924, the petitioner filed a complaint before the Deputy Magistrate of Diamond Harbour charging the opposite party with the same offence. The matter was sent to the police for enquiry and it appears that both the cases were sent up by the police.

It appears that both the cases were fixed for hearing on the 26th February. On that date some witnesses were examined in the case against the petitioner and the case in which the petitioner was the complainant was adjourned to the 3rd March. The learned trial Magistrate in his explanation submits that the complainant in both cases wanted their cases to be taken up first. As this was physically impossible he took up the case against the petitioner first and as he had no time on that date to take the petitioner's case it was adjourned to the 3rd March. On the 3rd March the petitioner made several applications one of which was that the trial of his case might be adjourned till the disposal of the case against him. The application was rejected by the Sub-Divisional Officer. The petitioner thereupon moved the District Magistrate of 24 Parganas for transfer of both the cases from the file of the Sub-Divisional Officer and in the alternative for stay of the case in which he was the complainant pending the disposal of

the case against him. The learned District Magistrate over-ruled these objections and the petitioner obtained this Rule.

The first case that has been placed before us dealing with this point is the case of *Bachu Mullah v. Sia Ram Singh* (1). There are some very emphatic expressions of opinion by Petheram C. J. and the practice of having counter cases tried together is strongly condemned. This decision was not considered as good law by a Bench consisting of three Judges in the case of *Queen-Empress v. Chandra Bhuiya* (2) and it was distinguished or its authority attempted to be belittled by the fact that in the case of *Bachu Mullah* (1) the learned Judges did not base their decision upon the opinion there expressed and though the Rule was issued upon that ground it was ultimately discharged. In the case of *Queen-Empress v. Chandra Bhuiya* (2) also though the learned Judges did not accept the dictum in *Bachu Mullah's case* (1) they did not interfere with the procedure adopted by the trial Court on the ground that the accused was not prejudiced and that it was a mere irregularity which has occasioned no failure of justice. These cases may be distinguished because the question arose for consideration in them after the decision of the cases. The question arose for consideration in them after the conclusion of the cases and the final orders passed in them did not rest on the conflicting views taken. The point has arisen before us with reference to pending cases. In *Garibulla Akanda v. Sadar Akanda* (3) the learned Judges were of opinion that two cross cases should not be heard at one and the same time and the evidence in one should not be taken into consideration in the other case. It does not appear from the report that the cases above cited were placed before their Lordships. In *Judisthir Gope v. Sheikh Samir* (4) it was held that cross cases should be tried one after the other. The peculiar feature of that case was that one of the cases has already reached the final stage whereas very little was done in the other case. In *Sheik Bahadur v. Nobadali* (5) decided by the criminal Bench dealing with undefended cases it was held that counter cases should be tried simultaneously and contemporaneously but should be dealt with wholly separately from each other, each on its own merits and upon facts and circumstances appearing therein; the judgment in two cases being pronounced, if possible, after both the trials are over. There is an unreported case (Criminal Revision Case No. 662 of 1919) decided

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(1) (1886) I. L. R. 14 Calc. 358.

(2) (1892) I. L. R. 20 Calc. 337.

(3) (1923) 39 C. L. J. 331.

(4) (1922) 27 C. W. N. 700.

(5) (1924) 28 C. W. N. 487.

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by Sanderson C.J. and Duval J. on the 27th August 1919), in which the view expressed in *Bachu Mulka's case* (1) was accepted. In this state of the case-law we feel that there is no authority which is absolutely binding upon us. The Code is silent with regard to the procedure to be adopted in such circumstances. It should not therefore be laid down as an absolute rule of law that a particular course must be adopted. Each case has to be decided according to its requirements. In the present case the petitioner wants that his case should be taken up after the case against him has been decided. He apprehends that as an accused in the case against him he cannot be cross-examined but as a complainant he will be subjected to cross-examination by his adversary. The law does not allow an accused person to be cross-examined and we do not think that it will be proper that he should be compelled to place himself in the box for examination, though not in the capacity of an accused person. In the cases that have been decided and to which we have referred grievance was made by one of the parties as to simultaneous or separate trial of the cases. In some cases a party wanted that his case should be tried simultaneously with the cross case against him and he was willing to take the risk of his being cross-examined in his case. The petitioner in this case does not want to run that risk and it is not fair to force a person in the position of an accused to throw himself open to cross-examination by the other side. Further more in the present case we find that 16 witnesses have been examined in the case against him. We think therefore that it will serve the ends of justice if we direct that the case against the petitioner should be disposed of first and then the petitioner's case if he so wishes, be taken up, and we order accordingly.

The Rule is made absolute to this extent.

Let the record be sent down at once.

A. T. M.

Rule made absolute.

(1) (1886) I. L. R. 14 Calc. 358.

CIVIL RULE.

*Before Sir. Ewart William Greaves, Knight, Judge and
Mr. Justice B. B. Ghose.*

D. D. BARBAR

v.

I. W. C. DEBENHAM AND ANOTHER.*

CIVIL.

1925.

July, 7.

*Standard rent, fixing of—Fans and lights, if attached to building—Intention—
Calcutta Rent Act (III. B. C. of 1920), section 2 (c)—‘Premises’.*

Whether electric fans and lights go with and form part of the premises or building demised, depends on the intention of the parties and on the nature of agreement to be gathered therefrom.

In the present case it was held that the electric fans and lights attached to the part of the building demised and intended to be used with it, to be taken according to the intention of the parties, as part of the demised building for the purposes of the Calcutta Rent Act and that it was open to the Rent Controller to fix a standard rent: *Wells v. Dickinson* (1) distinguished.

Application for Revision by the Petitioner under section 115 of the Code of Civil Procedure.

The petitioner took from the opposite party a lease for a period of 21 months from 1st September, 1923 with an option of renewal, the lower flat of No. 4 Rawdon street at a rental of Rs. 320 per month inclusive of taxes and without any other extra charge but excluding the cost of electric current. Subsequently an application was made to the Rent Controller by the petitioner to fix the standard rent of the premises.

The other facts appear from the judgment of Greaves, J.

Babu Suresh Chandra Taluqdar for the Petitioner.

Messrs H. L. Ganguli, Satindra Nath Mukerjee and Babu Saroj Kumar Dutt for the Opposite Party No. 1.

Babus Hiralal Ganguli, Asita Ranjan Ghose and Profjulla Chandra Chakraborty for the Opposite Party No. 2.

The judgments of the Court were as follows :

Greaves J.:—By an agreement in writing contained in two letters dated respectively the 29th and 31st August 1923, the first

July, 7.

*Civil Rule No. 497 of 1925, against the order of Mr. Sarat Chandra Banerjee, President of the Tribunal, dated the 26th February, 1925, affirming that of Babu B. Ganguli, Controller, dated the 19th August, 1924.

(1) (1923) 28 C. W. N. 774.

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of which was addressed by the petitioner to the respondent Debenham and the second by Debenham to the petitioner, the respondent Debenham agreed to let and the petitioner agreed to take for a period of 21 months from the 1st September 1923 with an option of renewal as therein mentioned, the Lower Flat of No. 4 Rawdon Street comprising the following accommodation, sitting room with one electric fan and lights, three bed rooms with bath rooms each bed room with one electric fan and lights also lights in the bath room, south verandah with space under stairs with electric lights and other accommodation as therein mentioned at a rental of Rs. 320 per month inclusive of taxes and without any other extra charge but excluding the cost of electric current. An application was subsequently made to the Rent Controller by the petitioner to fix the standard rent of the premises and the Rent Controller on the 20th August 1924 fixed the standard rent at Rs. 232 per month holding that the fans, electric lights and fittings formed part of the premises.

An appeal was preferred against this order to the President of the Tribunal who held that a standard rent under the Rent Act could not be made to cover fans, light or any other thing not forming part of a building or hut.

He arrived at the same figure as the Rent Controller for the standard rent of the premises exclusive of fans, lights etc.

The decision of the President was based on the definition of premises in section 2 (e) of the Calcutta Rent Act and he held that the word premises could not cover fans and lights etc, as they did not form part of the building.

Against the order of the President of the Tribunal the present Rule was obtained on the 24th April, 1925. Premises in section 2 (e) of the Calcutta Rent Act are defined as meaning any building or hut let separately for residential, charitable, educational or public purposes or for the purposes of a shop or an office and by section 15 of the Act the Rent Controller is empowered to certify the standard rent of any premises.

In *Sewell v. Angerstein* (1), Wills, J., held that gasaliers formed part of the free hold. The finding was arrived at in the case of a lease which was conveyed or assigned by the defendant to the plaintiff and included in the conveyance or assignment were the fixtures which were held to include the gasalier attached by screws to the gas pipes.

In *Smith v. Maclure* (2) Pearson J., held that gas fittings, gas-

(1) (1868) 18 L. T. N. 5300.

(2) (1894) 32 W. R. 459.

iers and a table lamp screwed to a pipe were fixtures and that this expression included whatever articles were substantially part of the house so that they could not be removed without depriving the building of that which was intended to be used with it.

I cite these authorities not as authorities for showing what are or are not fixtures, as what are deemed fixtures in England may not be fixtures according to Indian law and vice-versa but as showing that it depends on the intention of the parties and on the nature of the agreement to be gathered from the same whether such findings as fans and lights are intended to go with and to form part of the premises or building demised.

I think that in the present case the fans and lights which were attached to the part of the building demised and which were intended to be used with it must be taken according to the intention of the parties to be part of the demised building for the purposes of the Rent Act and that it was open to the Rent Controller to fix a standard rent which comprised these.

The case of *Wells v. Dickinson* (1) to which we were referred has in my opinion no bearing on the present case. In that case a furnished flat was demised and it was held that although the Rent Controller had jurisdiction under the Act to fix a rent for the premises apart from the furniture he had no jurisdiction to fix a standard rent which included the furniture.

That case is distinguishable as clearly the furniture could by no stretch of imagination have been intended to form part of the building for the purposes of the letting whereas in the present case the fans and lights which were attached to the building formed part of the building for the purposes of the demise according to the true intention of the parties as indicated in the agreement. I would make the Rule absolute with costs 5 gold mohurs. The matter will now go back to the President of the Tribunal in order that he may consider what is the standard rent of the premises including the fans and lights.

B. B. Ghose J : I agree.

A. T. M.

Rule made absolute.

(1) (1923) 28 C. W. N. 774.

Civil.

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I. W. C. Debenham.

Greaves, J.

APPELLATE CIVIL:

*Before Sir Hugh Walmsley, Knight, Judge, and
Mr. Justice Mukerji.*

DWIJENDRA NATH MALLIC AND ANOTHER.

v.

GOPIRAM GOBINDARAM.*

Civil.

1924.

April, 2, 3.
May, 15.

*Mortgage bond—Consideration—Contract Act (IX of 1872), section 23 Ill. (h)—
Agreement, effect of—Public policy—Not taking the administration of law
out of the hands of Judges—Stifling criminal prosecution—Non-compound-
able offence—Registration—Bond given by debtor and third party.*

The first defendant, who was the servant of the plaintiff firm, misappropriated Rs. 30000 of the firm money. The Commissioner of Police prosecuted him for the offence. On the intercession of the friends of the defendant, it was arranged that the plaintiff firm would agree to the prosecution being given up, if they received Rs. 15000 in cash and a mortgage for a sum of Rs. 5000. The firm laid all the facts before the Police and left it to the Commissioner of Police to decide whether the case should go on or not, and it was his decision that in the circumstances the charge might be withdrawn. The plaintiffs then obtained from the defendant Rs. 15000 and a mortgage bond for Rs. 5000 executed by defendant No. 1 and his brother, defendant No. 2 :

Held, that the agreement embodied in the mortgage deed was enforceable.

That the consideration for mortgage was valid and was not contrary to public policy within the meaning of section 23 of the Contract Act, as the plaintiffs did not render the criminal proceeding abortive.

That the plaintiffs did not act improperly in entering into the arrangement, as they brought the whole matter to the notice of the authorities responsible for the conduct of the prosecution and left it to them to decide whether they should proceed or not.

That both the defendants were liable under the mortgage deed.

Per Mukerji J : The general head of public policy covers a wide range of subjects and the doctrine of public policy is one which must always be applied with caution. At the same time, the doctrine may legitimately be invoked if the real object of the agreement is to interfere with the course of justice.

An agreement to stifle a prosecution is distinguishable from the lawful compounding of a compoundable offence. If the offence is not compoundable under the law, a compounding of it is illegal and opposed to public policy. If the effect of an agreement is to take the administration of the law out of the hands of the Judges and put it into the hands of a private individual to determine what is to be done in the particular case, it is opposed to public policy : *Collins v.*

*Appeal from Original Decree No. 57 of 1924, against the decree of Babu Atul Chandra Banerjee, Subordinate Judge, 2nd Court, of Howrah, dated the 21st December, 1923.

Blaptern (1) and other cases. On the other hand there is nothing to prevent a creditor from taking a security by a threat of criminal proceedings, so long as there is no agreement not to prosecute : *Floner v. Sadler* (2).

There is a good deal of difference between the motive for the act and the consideration or object of the agreement.

Illustration (h) to section 23 of the Contract Act, though not exhaustive, but only illustrative of the section, gives only a very gross and extreme instance.

The registration of the mortgage deed by whatever means it was effected, could not affect the character of the agreement which was already complete and the registration would give effect to the document from the date of its execution. The question of validity of the document is not affected so long as the registration is not held to have been without jurisdiction.

Where a *bona fide* debt exists and where the transactions between the parties involve a civil liability as well as a criminal act, a bond given by the debtor and a third party as security for the debt is not void under section 23 of the Contract Act : *Jai Kumar v. Gauri Nath* (3).

Appeal by the Defendants.

Suit on mortgage.

The material facts appear from the judgment.

Babus Rupendra Kumar Mitter and *Pashupati Ghose* for the Appellants.

Sir B. C. Mitter and *Babu Jagat Chandra Bose* for the Respondents.

C. A. V.

The judgments of the Court were as follows :

Walmsley J.—This appeal is preferred by the defendants, and the question that it raises is whether the agreement on which the suit is based was opposed to public policy.

The first defendant Dwijendra was employed by the plaintiff firm, and on March 3, 1919 he was sent to the Bank to cash a cheque for 30,000 Rs. He cashed the cheque and then went to the police with the story that the money had been stolen from him. This story was found to be untrue and he was arrested. Friends of the family went to a solicitor Mr. Akhoy Kumar Bose, and through his efforts it was arranged that the plaintiff firm would agree to the prosecution being given up, if they received 15,000 Rs. in cash and a mortgage for a sum of 5000 Rs. This mortgage was executed by Dwijendra and his brother Rajendra and it is the document upon which the suit is based. The plaintiffs on their side carried out the terms of the arrangement : they signed a petition to the Commis-

(1) (1767) 1 Sp. L. C. 11th Ed. 369.

(2) (1882) 10 Q. B. D. 572 C. A.

(3) (1905) 1 L. R. 28 All. 718.

CIVIL.

1915.

Dwijendra

Gopiram.

May, 15.

CIVIL:

1925.

Dwijendra

Gopiram.

Walmsley J.

sioner of Police asking that the prosecution should not be continued and the Commissioner gave his consent. The Presidency Magistrate afterwards wrote 'file' on the petition: whether he passed a formal order of discharge or not, we do not know, but I do not think it is of any importance.

None of these facts has been challenged before us, and the arguments have been confined to legal points. It is urged that the consideration of the agreement was unlawful as offending against the principle laid down in section 23 of the Contract Act. A second argument was that the plaintiffs cannot fall back upon the debt, but that argument need not be considered because Sir Binode Chandra Mitter for the respondents said that he had no intention of doing so. A third argument is that at any rate the second defendant cannot be held liable.

The first argument, shortly stated, is that the agreement was one for stifling a prosecution. If that is a correct description of it, then it cannot be enforced, but the learned Judge has found to the contrary and has given his reasons for his conclusions.

The statute law of this country on the subject is to be found in section 23 of the Contract Act. It is as follows: "The consideration or object of an agreement is lawful unless * * * the Court regards it as immoral or opposed to public policy." * * * illustration (h) "A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful." The illustration unfortunately does not throw much light on a difficult matter.

In the present instance there is no room for the suggestion that the plaintiffs are making 'a trade of a felony'. On the contrary they assented to such generous terms that the defence set up by the appellants wears a most repulsive appearance. If however the agreement was contrary to public policy as explained in the Contract Act and in English decisions then we shall have no alternative but to dismiss the suit, however repugnant to our feelings such a course may be.

The offence with which defendant Dwijendra was charged was not compoundable under the provisions of the Criminal Procedure Code, and if the negotiations are to be regarded as a composition of such a non-compoundable offence then the conclusion must be that the object of the agreement was contrary to public policy. It is necessary therefore to see what the arrangement was. It is fully described by Mr. Bose, the solicitor, and he says that

so far from pressure coming from the plaintiffs it was brought about at the request and entreaties of the defendants. In cross-examination he speaks about the case being withdrawn, and about the plaintiffs agreeing to drop the proceedings, but we must look at what the plaintiffs actually did to determine whether those expressions are correct.

The first thing they did was to write a letter or petition to the Deputy Commissioner: it was returned and another petition was written addressed to the Commissioner of Police. The plaintiffs had the assistance of the Public Prosecutor Rai Bahadur Tarak Nath Sadhu who was conducting the prosecution, and of their own attorneys in preparing these petitions. The terms of the two petitions are substantially the same: the plaintiffs said that they could not afford to lose the whole sum, and that it was to their advantage to get a portion, and they hoped that permission would be given for the case to be withdrawn. The plaintiffs did nothing further. It was the defendants who engaged Mr. Pugh a solicitor to go to the Commissioner and urge him to allow the case to be withdrawn. He was successful, and the Commissioner wrote "No objection to withdrawal of the case" and the Magistrate wrote "file", after which no further steps were taken in connection with the prosecution.

It is to be noted that the plaintiffs did not at any stage abate any part of their charge against the accused, and they did not suggest that they would withhold their evidence if the case proceeded. They laid all the facts before the Police and left it to the Commissioner of Police to decide whether the case should go on or not, and it was his decision that in the circumstances the charge might be withdrawn. I cannot find in the conduct of the plaintiffs any reason for supposing that if the Commissioner's decision had been different, the plaintiffs would have rendered the criminal proceedings abortive.

On this statement of the facts it must be allowed that the case comes very near the line, but on the whole I think that, whether we use the rhetorical expression of stifling a prosecution or the more homely words of the Contract Act, the action of the plaintiffs ought not to be regarded as contrary to public policy, because they did not take the administration of justice out of the hands of the authorities and themselves determine what should be done.

The first ground taken by the appellants fails.

There remains the third ground, namely that the second defen-

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dant, Rajendra is not liable. In his case it is said that there was no consideration. That seems a strange argument for any brother, perhaps I should say particularly for any Hindu brother, to put forward, and I regard the consideration as real and ample.

My conclusion is that the appeal should be dismissed with costs.

Mukerji J : The defendant No. 1 was a servant in the plaintiff firm. On the 3rd March 1919, the plaintiff firm handed over to the defendant No. 1 two cheques, one for Rs. 30,000 to be cashed at the International Banking Corporation, and the other a crossed cheque for Rs. 7384-9-9 p. to be paid in the same Bank. The defendant No. 1 cashed the cheque for Rs. 30,000 but did not pay in the other cheque for Rs. 7384-9-9 p. He then telephoned to the plaintiff firm that the money had been lost, and at about 4.45 p.m. appeared at the Police Station and gave an information to the effect that 30 G. C. Notes for Rs. 1000 each, one Chalan Book, and the cheque for Rs. 7384-9-9 p. had been stolen from his right shirt pocket. Thereupon he was arrested by the Police on suspicion. Immediately after the plaintiff's man arrived at the Police Station and laid a charge of criminal breach of trust against the defendant No. 1. The police took up the investigation in the course of which the defendant No. 1 was let out on bail. He was eventually sent up for trial before the Chief Presidency Magistrate of Calcutta.

On the 7th March 1919 the defendant No. 2 brother of the defendant No. 1, arrived from Jhargram where he had been from before. On the 14th March 1919 the two brothers and some other persons saw an attorney Mr. A. C. Bose and took his advice. The attorney advised them that there was no defence, and that the case would in all probability end in a conviction. The brothers then requested the attorney to bring about a settlement. The attorney sent for the plaintiffs. After some conferences an agreement was reached.

The settlement, as far as it can be ascertained from the evidence was in this form: The plaintiffs were to give up Rs. 10,000 out of their claim and accept Rs. 15,000 in cash and a mortgage executed by the defendants Nos. 1 and 2 securing the balance of Rs. 5,000. The money would remain with a third party, one Manik Chand. The plaintiffs would then apply for withdrawal of the criminal proceedings and after they were withdrawn, would get the money and the mortgage bond. On the 20th March 1919 a mortgage bond was duly executed by the two brothers, for a sum of

Rs. 5000 hypothecating their 2-7th. shares in their joint family properties.

On the 1st April 1919 a petition signed by the informant on behalf of the plaintiffs was put in before the Deputy Commissioner on whose order the defendant No. had been sent up for trial. The petition was in these words :—" The complainants having recently suffered heavy loss owing to the fall in the piece goods market and not being in a position to give up such an amount in their present state and the relation of the accused Dwijendra Nath Mallik having promised without prejudice to the pending criminal proceedings to make good a substantial portion of the loss of the complainant's firm, *if the criminal case aforesaid now pending be withdrawn* and all terms having been settled, complainant prays that the aforesaid criminal case be withdrawn." Nothing much came out of this petition, presumably because the Deputy Commissioner could not interfere in the matter, the case having already gone before the Court. On the 16th April 1919, a petition purporting to have been filed on behalf of the complainant was filed before the Chief Presidency Magistrate. It stated that the accused (meaning the defendant No. 1) had approached complainant and offered to make good as far as possible, the loss suffered by him, without prejudice to the case, that the financial condition of the firm would not allow them to refuse the offer and that under the circumstances the complainant did not wish to proceed with the charge against the accused. The prayer was that the accused might be discharged, if necessary with the permission of the Court. The Chief Presidency Magistrate forwarded the petition to the Commissioner of Police with the remark "To Commissioner of Police for favour of disposal." The latter reported that he had no objection to the withdrawal of the case and the Chief Presidency Magistrate on the 5th May 1919 passed the order 'file' on the petition. Some days later the sum of Rs. 15000 which was held by Manik Chand as aforesaid was received by the plaintiff firm. Thereafter, as is usual in such cases, the two defendants were not very anxious to register the mortgage deed. Consequently, it appears, a letter was written to them by the plaintiffs' solicitor Mr. M. N. Sen calling upon them to register the document and intimating to them that if they failed to do so he would present the mortgage at the Registry office and apply for warrant for a compulsory registration. The letter also contained a threat that in case of such failure the plaintiff's firm would also withdraw the petition which they had filed in Court for withdrawal

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of the case. It was also stated in the letter that a copy of it was being sent to Rai Bahadur Tarak Nath Sadhu for his information. This gentleman, it should be stated, was the Public Prosecutor of Calcutta. Thereafter on the 1st May, 1919 the document was registered both the defendants admitting execution thereof.

On the 15th July 1922 the suit was filed for enforcement of the mortgage. The Court below decreed the suit, and hence the present appeal.

At the hearing of the appeal the facts alleged on behalf of the plaintiffs were mostly not disputed. It was no longer disputed that the information of theft was false or that the defendants approached Mr. A. C. Bose and on his advice sought his assistance to get a settlement effected with a view to have the case withdrawn. It was no longer asserted that Rs. 15,000 had not been paid by the defendants as alleged on behalf of the plaintiffs. Nor was it disputed that the mortgage bond was duly attested in accordance with the provisions of the law. The findings of the Court below to the effect that the defendant No. 1 did actually commit the offence in respect of the sum of Rs. 30,000 and that Rs. 15,000 was paid back in some of the identical notes that had been misappropriated were not challenged. In fairness to the learned vakil for the appellant, however, it should be said, that in the face of the evidence on the record it is hardly possible to dispute or challenge any of the aforesaid facts or findings.

The appellants' arguments give rise to three questions:— First, as to whether the agreement embodied in the deed is enforceable in view of the provisions of section 23 of the Indian Contract Act; Second, as to whether the contract was vitiated for want of free consent; and Third, whether it may be enforced as against the defendant No. 2 as evidently he was not a party to the offence and there was no liability on him for which he need have executed the mortgage.

In order to deal with the first question, the nature of the agreement has first of all to be ascertained with precision. As I have stated, it was to the effect that the plaintiffs were willing to accept Rs. 15,000 in cash and a mortgage from defendants Nos. 1 and 2 for Rs. 5000 in satisfaction of their claim for Rs. 30,000. The defendants Nos. 1 and 2 were willing that the plaintiffs should have what they wanted but not if the criminal proceedings against the defendant No. 1 were not withdrawn and the plaintiffs in their turn were willing to abandon the prosecution if they got the cash and

the bond. To give effect to this intention Rs. 15,000 was kept with a third party, the bond though executed remained unregistered, the plaintiffs put in the two petitions referred to above, the defendants engaged counsel to explain matters to the Commissioner of Police and eventually got the necessary permission from him which practically ended the prosecution, and it was only after the proceedings had been 'filed' that the plaintiffs received the money and the defendants got the deed registered.

The appellants' contention is that the agreement is void as the consideration or object of the agreement is opposed to public policy, and that it was in effect an agreement to stifle a prosecution. The general head of public policy covers a wide range of subjects and the doctrine of public policy is one which must always be applied with caution. At the same time, the doctrine may legitimately be invoked if the real object of the agreement is to interfere with the course of justice. An agreement to stifle a prosecution is of course distinguishable from the lawful compounding of a compoundable offence. If the offence is not compoundable under the law, a compounding of it must be held to be illegal and opposed to public policy. If the effect of an agreement is to take the administration of the law out of the hands of the Judges and put it into the hands of a private individual to determine what is to be done in the particular case it is opposed to public policy: *Collins v. Blantern* (1); *Kier v. Leeman* (2); *Williams v. Bayley* (3). On the other hand there is nothing to prevent a creditor from taking a security from his debtor for the payment of a debt due to him, even if the debtor is induced to give the security by a threat of criminal proceedings, so long as there is no agreement not to prosecute: *Flower v. Sadler* (4).

The respondent's contention is that the prosecution was not in the hands of the plaintiffs, but in the hands of the police and the public prosecutor was in charge of it, and that the plaintiff did not institute it, there was no agreement to withdraw the case and in fact no withdrawal thereof, the only order proved in the case being one of 'file'; and it is urged that for these reasons the case is not covered by illustration (h) to section 23.

Now, I am prepared to concede that the defendants would not have parted with the sum of Rs. 15000 or completed the execution of the bond for Rs. 5000 unless and until the criminal case against the defendant No. 1 was withdrawn, but I am not at all sure that

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(1) (1767) 1 Sm. L. C. 11th Ed. 369. (2) (1846) 9 Q. B. Ex. Ch. 371.

(3) (1866) L. R. 1 H. L. 200.

(4) (1882) 10 Q. B. D. 572 C. A.

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the consideration or object of the agreement was the withdrawal of the said case. The motive for the execution of the bond and the payment of the money was the withdrawal ; but there is a good deal of difference between the motive for the act and the consideration or object of the agreement. It is necessary to keep this distinction in view all the more in a case where there is a civil liability already existing which is discharged or remitted by the agreement. Even if all the principles of English Common law relating to agreements for stifling prosecution be held to be applicable to all kinds of non-compoundable offences in this country—a question about which I entertain some doubt in view of the fact that the offence of criminal breach of trust though declared non-compoundable by law is very often treated by the Courts as otherwise,—then if the principle of the doctrine be that “you shall not make a trade of felony” (Per Lord Westbury in *Williams v. Bayley* (1)), then it is difficult to see how the plaintiffs can be said to have acted improperly in entering into the arrangement to get what they were justly entitled to or rather much less than what they were so entitled, when they brought the whole matter to the notice of the authorities responsible for the conduct of the prosecution and left it to them to decide whether they should proceed or not. My learned brother does not find any thing culpable or wrong in the conduct on the part of the plaintiffs and what they did does not also offend against my sense of fairness and propriety. Illustration (h) though not exhaustive, but only illustrative of the section, gives only a very gross and extreme instance. I am therefore not prepared to say that upon the peculiar facts of the present case the contract between the parties was one opposed to public policy or that in any way tended to prejudice the state or hamper the administration of justice.

As regards the second ground, namely, whether the contract is vitiated for want of free consent, there is scarcely any material which may bring the case within any of the clauses of section 14 of the Contract Act. The parties had ample independent advice and it seems that the defendants not only did all that was necessary to be done willingly and out of their own accord but also on their own initiative. I attach no importance of the letter of Mr. M. N. Sen referred to above because the threat contained therein was merely for compelling the registration of the bond and as the registration thereof could be enforced by other means as well. The registration of the document by whatever means it

(1) (1866) L. R. 1 H. L. 200 (220).

was effected could not affect the character of the agreement which was already complete and the registration would give effect to the document from the date of its execution. The question of validity of the document is not affected so long as the registration is not held to have been without jurisdiction.

The appellant's last contention has not much substance. If the agreement was a valid one, and the appellant No. 2 voluntarily offered to join in the bond with his brother in whom he was interested, it must be presumed that there was a lawful consideration for the transaction. In the case of *Kessowji v. Hurjiwan* (1), it was held that a guarantee for the payment to creditors of debts due to them in consideration of the creditors abstaining from taking criminal proceedings is void, as being against public policy; but a man to whom a civil debt is due may take securities for that debt from his debtor, even though the debt arises out of a criminal offence and he threatens to prosecute for that offence, provided he does not, in consideration of such security, agree not to prosecute, but he must not by stifling a prosecution obtain a guarantee from third parties. This principle has been followed in the case of *Jai Kumar v. Gauri Nath* (2) where it has been held that where a *bona fide* debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a promissory note given by the debtor and a third party as security for the debt is not void under section 23 of the Contract Act.

For these reasons in my judgment the decision of the Court below is correct and the appeal must be dismissed with costs.

A. I. M.

Appeal dismissed.

(1) (1887) 1 L. R. 11 Bom. 566.

(2) (1906) 1 L. R. 28 All. 718.

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Before Mr. Justice Suhrawardy, and Mr. Justice Duval.

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PRIYA NATH CHATTERJEE AND ANOTHER

v.

LASKHMI NARAYAN BHATTACHARJEE AND ANOTHER.*

Trust—Trustee and stranger purchasing in execution—Inadequate price—Invalidity of purchase of one owing to some original relation with property—Title of other purchaser, if affected—Partial setting aside of execution sale—Presumption of share.

A trustee is not absolutely debarred from buying his *cestui que* trust's property but the Court will look on such sale with the greatest suspicion and if there is the slightest doubt about its genuineness, it will set it aside.

Per Suhrawardy, J: It is a violation of the principle of estoppel and equity to allow a trustee to raise a question as to the validity of a trust deed constituting him a trustee in law, for the first time in second appeal, after he has taken possession of the properties as trustee and dealt with them in the capacity of a trustee.

A ruling should be construed on the facts on which it is founded.

Per Curiam: On the 18th September 1896 and 1st July 1899 one S, husband and father of the plaintiffs, borrowed certain sums on notes of hand from defendants Nos. 1 and 2. On the 5th December, 1902, S and his co-sharers including defendant No. 2 executed a deed of trust in favour of two co-sharers, one of whom was defendant No. 1. Under the deed, the trustees took upon themselves the charge of all necessary duties for the management and protection of the joint estate. In 1903, S died leaving a widow, plaintiff No. 2, and his son plaintiff No. 1. On the 3rd April, 1904, the defendants Nos. 1 and 2 sued the son of S on the hand notes and on the 23rd August obtained a decree against him as representing the estate of S. This decree was subsequently executed and S's share in the property was sold in auction and purchased by defendants Nos. 1 and 2 at a very inadequate price. At the time of sale, defendant No. 1 was the trustee of the estate and defendant No. 2 was not the trustee at all. The present suit was brought on the 12th September, 1918 by the plaintiffs for setting aside the decree and the sale in execution thereof as fraudulently obtained and for recovery of, or in the alternative, for confirmation of possession of the property in suit. It was found that the decree and sale were not vitiated by fraud and were regular in all respects:

Held, that in consideration of the fiduciary relation existing between the parties and of the fact that the properties were sold at an inadequate price, the purchase by defendant No. 1 could not stand, and the sale of the property to him

*Appeal from Appellate Decree No. 2560 of 1922, against the decree of K. C. Nag Esq, 4th Additional District Judge of 24, Pergannahs, dated the 31st May, 1922, affirming that of Babu Durga Prosad Ghosh, Officiating Subordinate Judge 1st Court of 24. Pergannahs, dated the 22nd December, 1919.

was inoperative, ineffectual and unenforceable against the plaintiffs to the extent of his share.

That the purchase by defendant No. 2 was not affected by reason of the incapacity of his co-purchaser, and should prevail.

That as the shares of the purchasers were not defined, it might be presumed that they had one-half share each.

Appeal by the defendants.

Suit for recovery of possession.

The material facts appear from the judgment.

Messrs Mahendra Nath Ray, Sarat Chandra Mukherjee and Gopal Chandra Chakravarti and Babu Indu Bhusan Mukherjee for the Appellants.

Mr. Ram Chunder Mozumdar and Babu Rupendra Kumar Mitter for the Respondents.

The judgment of the Court were as follows :

Suhrawardy, J : The facts upon which the present suit was brought by the plaintiff respondents are these : On the 18th September 1896 and 1st July 1899 one Sashi Bhusan Bhattacharji husband and father of the plaintiffs borrowed certain sums on notes of hand from defendants No. 1 and 2. On the 5th December 1901 Sashi Bhusan Bhattacharji and his co-shares including defendant No. 2 executed a deed of trust in favour of two co-sharers one of whom was defendant No. 1 Priya Nath Chatterji. Under the deed the trustees took upon themselves the charge of all necessary duties for the management and protection of the joint estate. In December 1903 Sashi Bhusan died leaving a widow plaintiff No. 2 and two sons plaintiff No. 1 and one Haladhar subsequently died childless leaving his mother the second plaintiff as heir. On the 3rd April 1904 the defendants Nos. 1 and 2 sued the two sons of Sashi Bhusan on the hand notes and on the 23rd August obtained a decree against them as representing the estate of Sashi Bhusan for Rs. 4348. This decree was subsequently executed and Sashi Bhusan's share in the property described in the schedules Ka and Kha of the plaint were sold in auction and purchased by defendants Nos. 1 and 2 (appellants) for Rs. 1200. On the 31st March 1905 an application made by plaintiff No. 1 and Haladhar under sections 244 and 311 of the Code of 1882 was dismissed. The present suit was brought on the 12th September 1918 by the plaintiffs for setting aside the decree and the sale in execution thereof as fraudulently obtained and for recovery of, or in the alter-

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native, for confirmation of possession of the property in suit. Both the Courts below have agreed in decreeing the plaintiffs' suit and setting aside the decree and the execution sale held on the 18th of December 1904, not on the ground that the sale was bad under the Code of Civil Procedure but on the ground that defendant No. 1 being a trustee was not competent to purchase the property. The learned Additional District Judge on appeal found that defendant No. 2 never acted as trustee to the properties in question. But relying on a certain decision of their Lordships of the Privy Council the learned Judge held that the entire sale was bad and ought to be set aside.

The defendants Nos. 1 and 2 have appealed and on their behalf several points have been taken. It is first contended that the trust-deed of 1902 did not create such a valid trust as to constitute defendant No. 1 a trustee in law and make the purchase by him invalid. This point was not taken in any of the Courts below and we do not think that we should allow the appellants to raise it for the first time in this Court. It is a violation of the fundamental principle of estoppel and equity to allow the trustee to raise it after he has taken possession of the properties as trustee and dealt with them in the capacity of a trustee.

The next point taken is that the purchase by defendant No. 1 is not necessarily illegal as he was charged with the management of the properties only and was not a trustee for sale. The law on this point is hardly open to controversy due to the decisions of the English Courts and of the Privy Council. In the case of *Manohar Mookerjee v. Raja Peary Mohan Mookerjee* (1) it is observed: "It is equally well settled that a trustee for other purposes than for sale cannot purchase the property where the purchase would conflict with his duty respecting it or his position in regard to it; but in this class of cases there is no absolute rule against his purchasing the trust property from his *cestui que* trust, although Courts of equity always regard such transactions with the utmost jealousy and will not hesitate to set them aside if their fairness is not conclusively established" This case of *Manohar Mookerjee v. Raja Peary Mohan Mookerjee* was taken to the Privy Council (2) and their Lordships in affirming the judgment of this Court remarked thus "A trustee for sale cannot purchase; he cannot purchase because the same person cannot be both vendor and purchaser; he who

(1) (1919) 30 C. L. J. 177.

(2) (1921) 1. L. R. 48 Cal. 1019; 34 C. L. J. 86.

acts for another cannot also act for himself. But even if he be not a trustee for sale, if in any capacity he is trustee of the estate, although his incapacity to buy is not absolute and is subject to different limitations it is equally well settled." In the present case the finding of fact of the Courts below is that the property was purchased at a wholly inadequate price. In consideration of the fiduciary relation existing between the parties and of the fact that the properties were sold at such an inadequate price and the other circumstances I think that the decision of the Courts below with regard to the purchase by the defendant No. 1 is correct and must be upheld.

It is argued in the third place that assuming that the sale of the trust property was bad it did not affect property No. 4 of the plaint inasmuch as it was not included in the trust properties and covered by the trust deed of 1904. The learned Judge has found that property No. 4 described in schedule Kha was taken possession of by defendant No. 1 as a trust property who dealt with it and managed it as such and had complete control over it for that purpose. On this finding the defendant must be taken to be a trustee appointed by consent or conduct of the party or as a trustee *de son tort*. In any view his possession with regard to this property was not in any way different from that in respect of the other property.

It is next argued that if the sale is to be set aside and the properties restored to the plaintiffs such restoration must take place on terms on equitable grounds, namely, that the plaintiffs should be held bound to pay the defendants the full amount of the decree, now that the defendant's claim under the decree has been extinguished by lapse of time. On this point also the appellants should not succeed. It was not a transaction between parties one of whom was an honest party as a *bona fide* transferee for value without notice. The defendant No. 1 while holding the position of a trustee brought the property to sale and purchased it at an inadequate price. On these facts no equity can arise in favour of the defendant No. 1 and the principle that one who seeks equity must do equity does not apply. The Courts below have, however, decreed that the plaintiffs will pay to the defendants the amount for which the property was sold before they can recover possession of it.

The last question raised by the appellants requires more detailed consideration. It is maintained on behalf of defendant No. 2 that though the purchase of defendant No. 1 was bad in

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law the purchase by defendant No. 6 who was a joint decree-holder with defendant No. 1 should not be held illegal by the defect in the purchase by the other defendant and should not be set aside. The Courts below have taken the view that the entire sale ought to be set aside. The learned Judge on appeal observes as follows :—" The trustee whether he be a trustee for sale or for other purposes cannot purchase the trust property ; and the purchase by him jointly with another person unconnected with the trust is liable to be set aside at the instance of the *cestui que trust*." For his reasoning he relied on the decision of the Judicial Committee in the case of *Dhonender Chunder Mookerjee v. Mutty Lall Mookerjee* (1). If their Lordships of the Judicial Committee have laid down the law in that case as formulated by the learned Judge, his decision should be upheld. But on a close examination of the case it would appear that their Lordships did not intend to lay down any such broad proposition. It is hardly necessary to remark that a ruling should be construed on the facts on which it is founded. In the case of *Dhonender Chunder Mookerjee v. Mutty Lall Mookerjee* (1) the facts were that one Shumbhoo Chunder Mookerjee died leaving five sons as executors and residuary legatees. After his death a posthumous son was born of the name of Sreeman Chunder. One of the sons of Shambhoo Chunder, namely Harish Chunder subsequently died leaving a will under which he appointed his eldest brother Juggut Chunder and second brother Mohesh Chunder as his executors. Juggut did not join in obtaining probate and subsequently renounced executorship and Mohesh remained the sole executor under Harish Chunder's will. Juggut, the eldest son, as executor of his father's estate brought a suit and obtained a decree against his father's brother for a sum of Rs. 170,000. Thereafter Mohesh as executor of Harish's estate sold to Juggut Chunder the one-sixth interest of Harish in the decretal amount for a sum of Rs. 5000. The purchase was made in the name of Juggut but for the benefit of Juggut himself and Sreeman Chunder. On these facts their Lordships held that the purchase by Juggut, as he was a trustee of Shambhoo's estate to which one-sixth share of Harish belonged, was illegal and should be set aside. But it was argued before their Lordships that as Sreeman Chunder was only a party to the purchase through Juggut the purchase by him was not affected by any defect in Juggut's title. In dealing with this question their Lordships made the following observations : " But if Juggut Chunder, holding the decree in a fiduciary position,

(1) (1874) L. R. 2, I. A. 18; 14 Beng. L. R. 276.

could not purchase it for himself, could Sreeman Chunder employ Juggut Chunder, who held the decree in a fiduciary position, to purchase that decree for the benefit of himself and Sreeman Chunder jointly? It appears to their Lordships that the same objection would apply to Juggut Chunder's purchasing for himself and Sreeman jointly as there would be to his purchasing for himself alone. One of the reasons for setting aside transactions such as this is that the purchaser is presumed, from his position, to have better means than the vendor has of ascertaining the value of the property purchased. Well, then, if a person, knowing that another holds a fiduciary position and has a better knowledge of the value than the vendor, employs that person to purchase for him and the trustee purchases secretly in his own name for the benefit of that other, it appears to their Lordships that the sale is equally invalid against the person for whose benefit it is purchased by the trustee as it would be against the trustee himself; therefore it was not necessary in this suit to file a bill to set aside the sale merely as to half the estate as against Juggut Chunder, and to allow it to stand for the benefit of Sreeman Chunder." The ground upon which this pronouncement was made is that when purchase is made through a trustee or in the name of a trustee, though for the benefit of a third person, it is as bad as the purchase by the trustee himself because the rule of law which makes the purchase by the trustee for himself bad applies with equal force to the purchase made by him for the benefit of another as in both the cases the trustee takes advantage of his special knowledge and connection with the property. Upon this decision is based the statement of law laid down in Lewin's Law of Trust (12th Edition p. 571): "As a trustee cannot buy on his own account, it follows that he cannot be permitted to buy as agent for a third person: the Court can with as little effect examine how far the trustee has made an undue use of information acquired by him in the course of his duty in one case as in the other." *Dhonender Chunder Mookerjee's case* (1) therefore is an authority for the proposition that if a trust-property is purchased by the trustee as agent or benamidar of a third person such a purchase cannot be upheld. It does not follow that where purchase is made by a *bona fide* purchaser jointly with the trustee the entire transaction should be set aside on the ground that a part of it is invalid. Learned advocate for the respondent has relied upon this case and several other cases to which reference will shortly be made for the broad proposition that where a pur-

(1) (1874) L. R. 1 L. A. 18.

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chase is made by a trustee jointly with another person, the whole transaction should be set aside. He has relied in support of his contention also upon the case of *McPharson v. Watt* (1). A cursory glance at the judgment of that case may appear to lend some support to the contention of the respondent. But a close examination will show that it did not lay down any such proposition. There were four houses belonging to two ladies. To a solicitor of the name of Mr. John Watt the ladies through their brother expressed their desire to sell the houses. The solicitor advised them not to advertise the houses in question for sale promising that he would obtain a purchaser. A few days afterwards John Watt presented his brother Dr. Watt as a purchaser for a certain price. The purchase was found to have been nominally made by Dr. Watt but was really made by John Watt himself. The House of Lords held that the purchase was bad and could not be enforced. It was argued at the bar that there was an arrangement between John Watt and his brother that of the four houses two would go to John Watt and two would remain the property of Dr. Watt. It was therefore urged that so far as the two houses which were to remain the property of Dr. Watt were concerned, the sale should be maintained. Lord Cairns L. C. in advising the House referred to the proposal made to Dr. Watt by his brother in these words: "There are four houses to be sold, if you will buy two I will buy the other two and we will get them at such and such a price, so much for your two and so much for my two." Then the Lord Chancellor proceeds to observe: "It seems to me that in principle the case is exactly the same, neither better nor worse than it would have been if in place of Dr. Watt being beneficially interested in two of the houses he has not been interested in any one of them and the person really interested in the whole had been John Watt. The only further observation I have to make is that even as to the two houses in which Dr. Watt is interested, it seems to me impossible that the sale can be supported, for the sale as between the vendor and the purchaser was one complete and entire sale, and even if you were to separate it into two parts, and to look at it as a sale first of two houses to John Watt and then of two to Dr. Watt, the principle upon which as between John Watt and his brother the price was arrived at was this, that John Watt should have his two house at one half of the total price and every mischief therefore, which would exist and which would render it impossible that an agent or a person in John Watt's position should purchase for his own benefit, would

(1) (1877) L. R. 3 A. C. 6254.

apply to the mode in which the price was fixed for the houses of which Dr. Watt was the purchaser." What his Lordship meant to say is that there was a secret understanding between two persons, thus to divide the property amongst themselves, and the advantage taken by the trustee of his special knowledge or connection with the trust property was not only for the benefit of the trustee but also for the benefit of the other person. If, therefore, the purchase is made by the trustee for himself and for another person in the name of the other the sale is not enforceable on the principle that the rule of law which declares a purchase by the trustee to be bad applies with equal, if not greater, force to such a case.

Reference in this connection has also been made to the case of *ex parte Forder* (1). That case has no bearing on the present question and only reiterates the principle that the purchase made by a trustee for himself and another in whom he is interested is as bad as if it was made for himself. There the purchase was made in the name of the trustee's son who was a minor and a nephew of the trustee's partner in business. On these facts the Court held that the case fell within the principle of the cases which have decided that an assignee in bankruptcy cannot sell the bankrupt's estate to his partner in business or his solicitor. The sale would, therefore, be void as contrary to the principle of the law even independently of the fact that one of the purchasers was a minor and legally incapable of entering into a contract. From this case Lewin on his book on trusts draws the following proposition. "That a partner of a trustee or any person from whom he may directly or indirectly derive benefit by reason of the purchase cannot purchase a trust property from the trustee." In the case of *Farrar v. Farrar* (2), property was sold by the mortgagee to a corporation of which he was a member. It was argued by the plaintiff that the sale was invalid as it was a sale by a mortgagee to himself under the guise of a limited company. Lindley L. J. in examining this argument observed thus. "A sale by a person to a corporation of which he is a member is not either in form or in substance, a sale by a person to himself. There is no authority for saying so. To hold that it is, would be to ignore the principle which lies at the root of the legal idea of a corporate body and that idea is that the corporate body is distinct from the persons composing it. A sale by a member of the corporation to the corporation itself is in every sense a sale valid in equity as well as at law. There is no authority for saying that such a sale is not warranted by an ordinary power

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(1) (1881) W. N. (Eng) 117.

(2) 40 Ch. D. 395.

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of sale, and in our opinion such a sale is warranted by such a power and does not fall within the rule to which we have at present referred. But although this is true, it is obvious that a sale by a person to an incorporated company of which he is a member may be invalid on various grounds although it may not be reached by the rule which prevents a man from selling to himself or to a trustee for himself. Such a sale may, for example, be fraudulent and at an under value or it may be made under circumstances which throw upon the purchasing company the burden of proving the validity of the transaction and the company may not be able to prove it. Fraud in the present case is not now alleged; it was alleged in the Court below and was there clearly disproved. But for reasons which will appear presently the circumstances attending the sale were such as in our opinion throw upon the company the burden of sustaining the transaction." This decision in my opinion lends some support to the appellant's contention that the purchase from the trustee by another person does not necessarily invalidate the transaction, but there may be circumstances which will throw burden upon such other person to prove that he was a *bona fide* purchaser for value and it may be difficult for a Court of equity to sustain the transaction.

No case has been cited which may have direct bearing upon the facts before us. In this case the debt was contracted before the trust was created. To recover that debt a suit was brought and a decree was regularly obtained. The property was brought to sale in execution of that decree and purchased by the defendant No. 2. With regard to the character of this purchase both the Courts agree in finding that the decree and the sale were not vitiated by fraud and were regular in all respects. That being so, the purchase by defendant No. 2 can only be set aside if it can be established in law that a purchase jointly with the trustee at an auction in execution of a decree is bad in law. It is not a case in which the trustee was the seller. It is a case in which the property was sold through the intervention of the Court in public auction, although the trustee was one of the parties to the execution. So far as defendant No. 2 is concerned, he is not affected by the infirmity in the title of his co-purchaser. He had a decree in his favour which he was entitled to execute. His co-decree-holder joined with him in executing the decree. There was no duty cast upon him either in law or in equity to see that the co-judgment creditor did not purchase the property. If the property is purchased by two persons one of whom owing to some inherent incapacity in him or owing

to his original relation with the property is incapable of acquiring any title to it there is no reason why the title of the other purchaser should be affected by reason of the incapacity of the co-purchaser.

It is also argued in this connection that the sale should not be partially set aside but if it is set aside so far as defendant No. 1 is concerned, the entire sale ought to stand cancelled. This argument, I suppose, is based on the use of the words *setting aside* in connection with this case. The Courts below have also loosely used the same expression and they held that the purchase by defendant is liable to be set aside. The expression 'set aside' in this connection is not to be understood in the sense in which it is used in order XXI Civil Procedure Code. The effect of the decision so far as the defendant No. 1 is concerned is that the sale of the property to him is inoperative, ineffectual and unenforceable against the plaintiffs to the extent of his share. As the shares of the purchasers in respect of the property purchased are not defined it may be presumed that they have one-half share each. The sale so far as the half share of defendant No. 1 is concerned must, therefore be held to be inoperative against the plaintiffs and the purchase by defendant No. 2 should prevail.

In the above view the appeal should be allowed in part, the decree of the Court below be set aside so far as it affects the interests of defendant No. 2 to the eight annas of the properties in suit. The suit of the plaintiff as against defendant No. 2 to the extent of eight annas of the properties in suit will stand dismissed. The decree of the lower appellate Court will be varied in the manner following. The plaintiffs will pay to defendant No. 1 Rs. 600 and the plaintiffs should recover possession of a half share of the properties in suit jointly with defendant No. 2. The defendant No. 1 will pay half of the costs of the suit in all the Courts to the plaintiffs and defendant No. 2 will recover half costs from the plaintiffs in all the Courts.

Duval J.:—The two chief points in this appeal appear to me to be these: (1) whether defendant No. 1's purchase will stand and (2) whether defendant No. 2's purchase will stand. Now, the finding of fact is that defendants Nos. 1 and 2 jointly lent money to the predecessor of the plaintiffs, obtained a decree after his death and purchased the property for the sum of Rs 1200, admittedly a most inadequate price for the property purchased. Another finding is that undoubtedly at the time of his purchase defendant No. 1 was the trustee of the estate, and that defendant No. 2 was

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not the trustee at all. It is also found as a matter of fact that there was no irregularity in obtaining the decree or in the conduct of the sale so as to justify the sale being set aside on ordinary grounds. The question then arises whether in view of the fiduciary relations existing between plaintiffs and defendant No. 1 the sale be declared void as regards him. As to that, the law appears to me to be perfectly clear. The trustee is not absolutely debarred from buying his *cestui que* trust's property but the Court will look on such sale with the greatest suspicion and if there is the slightest doubt about its genuineness, it will set it aside. The finding of fact here is that the property was sold at a grossly inadequate price. That to my mind is sufficient to make the purchase of defendant No. 1 a nullity. As to defendant No. 2, he was not a trustee. In fact he was *co-cestui que* trust with the plaintiffs and there is nothing to show that he used defendant No. 1 who was the trustee, for the purpose of purchasing the property. A large number of cases have been cited before us but they do not cover the present case. In the present case the defendant No. 2 is perfectly independent person though he undoubtedly joined with defendant No. 1 in the purchases at auction; he was however neither an assignee nor a benamdar of defendant No. 1 and he purchased as an ordinary member of the public in the ordinary course of business. In this view I do not see how the sale so far as he was concerned can in the circumstances of this case be set aside. None of the cases cited goes so far as to say that merely because the purchase is joint therefore it should be set aside in so far as a purchaser such as he is found to be concerned. In this view I agree with the judgment just delivered by my learned brother.

A. T. M.

Appeal allowed in part.

APPELLATE CRIMINAL.

*Before Sir Babington Bennett Newbould, Knight, Judge, and
Mr. Justice B. B. Ghose.*

FAZARUDDIN AND OTHERS.

v.

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January, 27, 28.

Evidence—Evidence Act (I of 1872), Secs. 6, 8, 9—Penal Code (Act XLV of 1860), Sec. 366—Abduction—Transaction—Sessions Judge expressing opinion on fact—Deposition of witnesses before committing Magistrate—Criminal Procedure Code (Act V of 1898), Sec. 288—Substantive evidence.

A certain witness stated that he had seen three women, who were sleeping in the same *bari* as the complainant and his wife that night, searching something at dusk :

Held, that as the alleged search that evening could not be treated as part of the same transaction as the abduction at night, section 6 of the Evidence Act could not make it admissible and as the women were neither parties to the case nor agents to any party, section 8 was inapplicable. Section 9 of the Act was also inapplicable.

There is no harm in the Sessions judge expressing his opinion on the fact and in fact it is his duty to do so to assist the jury provided he is careful to express his opinion in such a way as not in any way to interfere with the duties of the jury to finally decide according to their own view of the facts

The deposition of witnesses before the committing Magistrate when put in under section 288 of the Code of Criminal Procedure becomes substantive evidence and is used as such. It cannot be put in evidence as substantive evidence if for any reason it is irrelevant under the Evidence Act.

Appeal by the Accused under section 410 Criminal Procedure Code.

On the night of 18th November, 1923, Tuni the complainant, with his wife Bibijan was sleeping in the house of Tamiz Dafadar. At about midnight the accused and others cut open a corner of the *Bera* of the hut, dragged Bibijan out of the hut and took her away by force. Up to the date of trial, she was not found. On this fact the prosecution had charged the present accused for abducting Bibijan under section 366 Indian Penal Code.

The jury unanimously found Genda and Fazar guilty under section 366 Indian Penal Code but gave Dani the benefit of doubt.

*Criminal Appeal No. 541 of 1924, against the order of Mati Lal Roy, Esq., Assistant Sessions Judge of Rangpur, dated the 22nd July, 1924.

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They unanimously found the other two not guilty. The learned Sessions Judge agreeing with the verdict sentenced each to 5 years' rigorous imprisonment.

Mr. D. N. Bagchi and *Babu Mohini Mohan Bhattacharji* for the Appellants.

Mr. Khundkar (Deputy Legal Remembrancer) for the Crown.

The judgment of the Court was as follows :

The appellants have been found guilty under section 366, Indian Penal Code by the unanimous verdict of the jury and have been sentenced each to five years' rigorous imprisonment.

It is contended that the trial has been vitiated by the exclusion of relevant evidence and also misdirection by the Judge in summing up to the jury. It is suggested for the defence that the woman who has been found to be abducted, Bibijan, was actually missing in the evening and therefore could not have been, as alleged, abducted at midnight. The witness Nur Muhamad Munshi gave evidence that he had seen three women, who were sleeping in the same *bari* as the complainant and his wife that night, searching something at dusk. These women were not examined as witnesses and when the witness was asked what reply one of these women, who were searching for something, gave he was not allowed to answer the question we hold that the learned Sessions Judge was right in excluding this evidence. This alleged search that evening cannot be treated as part of the same transaction as the abduction at night so section 6 of the Evidence Act cannot make it admissible. Section 8 is of no help to the appellants since these women were neither parties to the case nor agents to any party. Section 9, the only other section of the Evidence Act on which reliance is placed is equally inapplicable.

As regards misdirection, several points have been argued, but they really all amount to this—that the learned Sessions Judge in dealing with these points expressed his opinion too strongly in favour of the prosecution. But though the learned Judge expressed his opinion strongly it is evident from his charge that he was careful to impress on the jury that on all questions of fact the decision rested with them and over and over again in the charge we find remarks like these. "I have the entire evidence to you to judge," "you are the Judges and you are to decide if you find the above question against the accused." There is no harm in the trial Judge expressing his opinion on the fact and in fact it is his duty to do so to assist the jury provided that he is careful to express his opinion in

such a way as not in any way to interfere with the duties of the jury to finally decide according to their own view of the facts. All the points to which reference is made, we find, have been adequately and properly dealt with in the charge to the jury. The suggestions made on behalf of the defence have been considered. The points as to non-examination of various witnesses have been discussed. One other point of importance taken is that the deposition of witnesses before the committing Magistrate was wrongly put in in accordance with the provisions of section 288, Criminal Procedure Code. It is contended that the concluding words of this section "Subject to the provisions of the Indian Evidence Act" mean that the depositions cannot be put in under this section unless they are admissible under some sections of the Indian Evidence Act. This is not the meaning of these words. The evidence of the deposition when put in under this section becomes substantive evidence and is used as such. But obviously it cannot be put in evidence as substantive evidence if for any reason it is irrelevant under the Evidence Act. To adopt the interpretation which we are asked to put on these concluding words would be to render the provisions of section 288 unnecessary and superfluous.

Having regard to the nature of the offence which the jury have found to have been committed we are unable to hold that the sentence passed is too severe.

The appeal is dismissed.

The appellants must surrender to their bail and undergo the unexpired portion of the sentence.

A. T. M.

Appeal dismissed.

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*Before Sir Babington Bennett Newbould, Knight, Judge, and
Mr. Justice B. B. Ghose.*

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February, 13.

KASEM MOLLA AND OTHERS.

v.

KING-EMPEROR.*

*Irregularity in commitment—Person committed, pleading to charge—Criminal
Procedure Code (Act V of 1908), Sec. 208—'Complainant'*

A Sessions Judge has jurisdiction to try a case which has been committed for trial to him, and if the trial is legally held an irregularity in the commitment will not vitiate the proceedings in the Sessions Court.

When a person had been put on his trial and pleaded to the charge, the commitment cannot be quashed : *In re Empress and Sagambur* (1).

It is too late to object to the commitment after the accused has pleaded to the charge before the Sessions Court

Quare : Whether the word 'complainant' in section 208 of the Code of Criminal Procedure applies to the person who laid the first information.

The commitment proceedings were commenced against four of the accused other than Basir and after ten prosecution witnesses were examined, the Magistrate directed that warrant should issue against Basir. On the day he was produced before the Court, three prosecution witnesses were examined in the presence of all the accused. Subsequently two more prosecution witnesses were examined in the presence of all the accused and the charge was framed. Afterwards the investigating police officer and the Sub-Deputy Magistrate who recorded the dying declaration were examined :

Held, that there was nothing in the method in which the commitment proceedings were held against Basir which would vitiate the trial.

Such procedure was however, disapproved

Appeal by the Accused under section 410 Criminal Procedure Code.

The material facts appear from the following judgment of the learned Sessions Judge.

The facts of the case for the prosecution are briefly these :—

Two *garus* of one Korban Sardar damaged the paddy crops on the paddy *khet* of Harez Sardar. Harez Sardar's brother Abdul Karim and his son Kanai seized the *garus*. They brought the *garus* home and after finishing their morning meals they started with the animals for the pound. On the way when they had gone as far as the house of one Saijuddi, a number of men, 20 or 25 in all,

*Criminal Appeal No. 386 of 1924, against the order of S. C. Mallik Esq., Sessions Judge of Faridpur, dated the 21st August, 1924.

(1) (1882) 12 C. L. R. 120.

came from three directions armed with *lathis*, *sarkis* etc. Among these men there were Korban to whom the *garus* belonged, as also one Mozam Kazi and all the five accused before you. Seeing the men Karim and Kanai took to their heels. Kanai managed to go back into their house but Karim was caught on the *palan* and there on the *palan* at the orders of Korban Sardar, Mozam kazi gave a *katra kope* on Abdul Karim on the right side of his abdomen, Abdul Wahed who also was one of the rioters gave another *karki* blow on the left side of the abdomen. Abdul Karim's entrails came out and when he was about to sit down, the accused Kasem gave him another *sarki kope* on the head. Abdul Karim fell down, Harez came up to help him whereupon the accused Baser Sardar gave Harez a *kope* with a *koek* on his left thigh. The accused Sahed and another man Abdul Goni by name Harez gave *lathi* blow on the head. Harez fell down. He was then surrounded by all the rioters who promiscuously beat him. There was a cry of murder raised and then the rioters left the place and went away. Harez and Abdul Karim were carried to the house. This happened at about 4 *dandas* of the day. The wounded men were then taken in a boat to Gopalgunj which was at a distance of about 10 miles from the place of occurrence. They reached Gopalganj in the afternoon wherefrom the Thana they were sent to the hospital. A first information report was duly lodged and the two wounded men were placed under treatment. The condition of Abdul Karim, the man whose entrails had come out, was found to be very bad and a requisition was sent for recording the man's dying declaration. A Sub-Deputy Magistrate came to the hospital and recorded the statement which Abdul Karim made before him. Abdul Karim shortly after this died. A post-mortem examination was held on his body. An investigation followed and the 5 accused were sent up for trial.

These are the facts of the case for the prosecution. The accused have all pleaded not guilty. None of the accused, however, with the exception of Kasem has told you what the occurrence was, if there was any occurrence at all. The accused also have not adduced any evidence in their defence. But simply because they have not told you what the occurrence was and they have not adduced any evidence in their defence, you must not draw any inference adverse to them. In a criminal trial it is for the prosecution to prove its case, and if the prosecution cannot substantiate its case, an accused is entitled to an acquittal.

According to Kasem there was an occurrence, but the occurrence

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took place not on the *palan* of the complainant, but on the *khet* on the west of the complainant's house beyond the *halot*. Kasem says that this *khet* is in his possession under Korban, that it was he (Kasem) who grew crops on it against the opposition of the complainant, that the complainant Harez and his brother Karim deliberately had the crops of this *khet* damaged by means of some *garus* and goats and that when Kasem and his brother Yusuf remonstrated, Harez and Karim beat them and they (Kasem and Yusuf) also beat them.

That there was an occurrence and that Abdul Karim is dead can hardly admit of any doubt. A number of witnesses have deposed before you on the point and the doctor who held *post-mortem* examination on the dead body of Abdul Karim has also given his deposition before you. If you believe the doctor, there can hardly be any doubt that Abdul Karim died from the effects of the two injuries which he got on his abdomen resulting in his entrails coming out and Harez had as many as nine injuries, though not of a severe nature, on his person. The points for your determination will be, how did these men come by these injuries? Did they get them in an occurrence taking place in the way as alleged by the prosecution?

Babus Probodh Chandra Chatterjee (for Babu Pasupati Ghose) and *Dwijendra Nath Mukherji* for the Appellants.

Mr. Khundkar (Deputy Legal Remembrancer) for the Crown.

The judgment of the Court was as follows :

February, 13.

The four appellants before us were tried before the Sessions Judge of Faridpur and a jury on various charges of offences committed in the course of a riot in which they were accused of having taken part. The first two appellants were sentenced to 7 years, rigorous imprisonment each under section 304/149 Indian Penal Code and 2 years rigorous imprisonment each under section 324 Indian Penal Code, the sentences to run concurrently. The third appellant was sentenced to 5 years' rigorous imprisonment under section 304/149, and no separate sentence was passed on his conviction under section 147 Indian Penal Code. The fourth appellant was sentenced to two years' rigorous imprisonment under section 147 Indian Penal Code.

As regards the appellant Basir Sardar a special point is taken, and that is that his conviction should be set aside on the ground of illegality in the proceedings before the committing Magistrate. Five persons were committed to the Court of Sessions in this case one of whom has been acquitted. The commitment proceedings

commenced against four of these accused other than Basir Sardar, and on the 25th June 1924 ten prosecution witnesses were examined. The Magistrate then directed that warrant should issue against Basir Sardar and he was produced before the Court on the 8th July. On that date three prosecution witnesses were examined in the presence of all the accused. On the 23rd July two more prosecution witnesses were examined in the presence of all the accused and the charge was framed. On the 28th July the investigating police officer and the Sub-Deputy Magistrate who recorded the dying declaration were examined apparently under section 219 Criminal Procedure Code. It is contended that this procedure was contrary to the provisions of section 208 Criminal Procedure Code. In our opinion even if the provisions of that section were not strictly followed that would not be a sufficient ground for setting aside this conviction. No reported cases have been shown to us in which the conviction has been set aside on the ground of irregularity or illegality in the commitment. It is not shown that the appellant Basir has been in any way prejudiced. Even assuming that there has been such an irregularity or illegality in the proceeding as would justify us in quashing the commitment had such an application been made to us before the commencement of the trial we hold that we should not therefore be bound to hold that the conviction should be set aside. The Sessions Judge has jurisdiction to try a case which has been committed for trial to him, and if the trial is legally held we doubt if an irregularity in the commitment would vitiate the proceedings in the Sessions Court. In the case of *Empress and Sagambur* (1) it was held that when a person had been put on his trial and pleaded to the charge the commitment cannot be quashed, and we agree with that decision that it is too late to object to the commitment after the accused has pleaded to the charge before the Sessions Court. Taking this view it is not necessary to decide whether there was an illegality in the commitment but we may state that we have some doubts on this point. Section 208 Criminal Procedure Code provides that the Magistrate shall when the accused is brought before him proceed to hear the complainant if any and take all such evidence as may be produced in support of the prosecution. It does not appear that in this case the Magistrate omitted to take any evidence which was produced in support of the prosecution of the accused Basir. The same objection was taken before the Sessions Judge and he overruled it on the ground that one or two prosecution witnesses who were

(1) (1882) 12 C. L. R. 120.

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examined in the presence of Basir named him in the committing Court as "being present in the dock and taking part in the riot."

It is urged that the Magistrate was in any case under this section bound to hear the complainant in the presence of the accused. But it is not clear that the word complainant in this section applies to the person who laid the first information. Section 250 (3) of the Code draws a distinction between an informant and a complainant. In section 170 the words there used in the second clause "the complainant if any" indicate that the informant in a case which has been investigated by the Police is not necessarily the complainant. Section 444 of the Code gives the definition of a complainant which would include the informant under section 154, but that definition is a special definition limited to the use of that word in the preceding section 443.

But though we hold that there was nothing in the method in which the commitment proceedings were held against this accused which would vitiate the trial we must not be held to approve of this procedure. We may point out that by following this procedure it might happen that the prosecution would be seriously embarrassed at the Sessions trial, since if they wished to take advantage of section 288 and put in any deposition under that section for use at the Sessions trial, this could not be done as against the accused in whose presence the depositions were not recorded. Other difficulties also might arise.

The next point urged on behalf of all the appellants is that there was serious non-direction amounting to misdirection on account of failure of the learned Sessions Judge to draw the attention of the jury to an important passage in the dying declaration made by the man Abdul Karim who has been found to have been killed in the riot. In this statement Karim after giving an account of the occurrence and the wounds inflicted on him stated, "no one else but any one else." It is said that this is totally contradictory to the case for the prosecution and therefore the special attention of the jury should have been drawn to this point. It seems to us that the point is not one of real importance. There is a mass of evidence on the side of the prosecution contradicting the statement. It is obvious that Karim could not know what happened after he was struck and became unconscious. Further it was not even the case for the defence that Karim was the only man assaulted, for we find that Karim Molla the first appellant when examined in the Sessions

Court said, "I too assaulted them," thereby admitting that others than Karim were also assaulted.

It is objected that the charge did not sufficiently deal with the evidence against each accused individually. But we find that there is a paragraph in the heads of charge dealing with this point pointing out that the evidence against all the five accused as regards their presence at the time of the occurrence has not been exactly the same. That the jury appreciated the necessity of weighing the evidence against the accused individually is clear from the fact that they acquitted one of the accused who was on trial before them with the appellants.

The last point urged is that the jury were not told that the presence of the accused persons at the occurrence was not sufficient for a conviction under section 147 Indian Penal Code the only charge on which the four appellants have been convicted. But the learned Sessions Judge told the jury that one of the points they had to find to support a conviction on a charge of rioting was that the members of the unlawful assembly must have a common object. It does not appear either in the defence set out in the statements of the accused or as disclosed by the cross-examination of the prosecution witnesses that it was ever suggested that any of the appellants were present at the riot without being members of the unlawful assembly or without having the common object of that assembly. We therefore hold that there was no misdirection on this point.

The appeal fails and is dismissed. The appellants must surrender to their bail and undergo the unexpired portion of their sentences.

A. T. M.

Appeal dismissed.

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CRIMINAL REVISION.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and
Mr. Justice Panton.*

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May, 27, 28.

CHUNDER KUMAR SEN

v.

MATHURIYA DEBYA.*

*Sanction—Criminal Procedure Code (Act V of 1898), Secs. 476 A, 476 B—
Appeal—Limitation Act (IX of 1908), Sch. I Art. 154.*

If the subordinate Court has neither made a complaint under section 476 of the Code of Criminal Procedure nor rejected an application for the making of a complaint, then the superior Court may take action and make a complaint. But where the subordinate Court has rejected the application for the making of such complaint, then the procedure, which is contemplated by the Code of Criminal Procedure, is by way of appeal to the superior Court.

An appeal preferred more than thirty days from the date of order rejecting the application for the making of the complaint, is barred by limitation under article 154 schedule I of the Limitation Act.

An appellate Court in such matter of sanction is bound by the rule of limitation.

Application for Revision and Appeal under section 410 of the Code of Criminal Procedure by the Accused.

The material facts appear from the judgment.

Mr. N. K. Bose, Babus Probodh Kumar Das and Chunder Sekhar Sen for the Petitioner and Appellant.

Babu Paresh Chandra Sen for the Opposite Party.

Mr. Khundkar (Deputy Legal Remembrancer) for the Crown.

The judgments of the Court were as follows :

Sanderson C. J : This is a Rule obtained on behalf of Chunder Kumar Sen on the 23rd of April, 1925, calling upon the District Magistrate and the opposite party to show cause why the order complained of should not be set aside or such other order passed in the matter as to this Court might seem fit and proper.

The order complained of was made by the learned District Judge of Chittagong on the 31st of January, 1925 whereby the

*Criminal Appeal No. 210 of 1925 and Civil Revision Case No. 4 of 1925, against the order of J. W. Nelson Esq., District Judge of Chittagong, dated the 31st January, 1925, reversing that of Babu Nata Bihari Ghosh, Officiating Subordinate Judge of Chittagong, dated the 9th July, 1924.

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learned Judge directed that criminal proceedings should be instituted against Chunder Kumar Sen and Bejoy Singh Hazari for offences under sections 209 and 466 of the Indian Penal Code and for abetment of these offences.

This Rule deals with the case of Chunder Kumar Sen only. I think it is necessary to mention certain dates. It appears that an application was made to the learned Subordinate Judge for filing a complaint against the petitioner Chunder Kumar Sen. That application was disposed of on the 1st of October, 1923. By that time the amendment of the Criminal Procedure Code created by the act of 1923 had come into force and the learned Subordinate Judge declined to make a complaint under section 476 of the Code of Criminal Procedure as amended.

There was an appeal to the District Judge by the complainant. That was filed on the 7th of August, 1924. It was not disposed of until the 31st of January, 1925 by the learned District Judge, when as I have already stated, the appeal was allowed, and the learned Judge decided that criminal proceedings should be instituted against Chunder Kumar Sen for the offences which I have already mentioned.

The point upon which the learned advocate, who appeared for the petitioner, relied was that the appeal to the learned Judge was out of time and the learned Judge has no jurisdiction to entertain the appeal and to make the order. This point was taken before the learned Judge apparently, for he said as follows: "It is urged in his case" (that is the case of Chunder Kumar Sen) "that the appeal is barred by time as the Subordinate Judge passed orders on the 1st of October, 1923 that he would not proceed against respondents 2 and 3. I do not think that I am bound by any rule of limitation in a case of this kind. When an offence in connection with the administration of civil justice comes to the notice of the District Judge it is open to him to lodge a complaint in the criminal Courts although a subordinate civil Court may not have thought it necessary to take action." The learned Judge then proceeded to say that the case was of such gravity that he would be failing in his duty if he did not institute a complaint.

With much respect to the learned Judge I am of opinion that the provisions of the material sections do not support the conclusion at which he arrived.

Section 476 of the Code of Criminal Procedure deals with the procedure, which is to be adopted in cases referred to in section 195 sub-section (1) clause (b) or clause (c) by a Court, with regard

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Superior Court may
complain where
Subordinate Court
has omitted to do
so.

to offences which appear to have been committed in or in relation to a proceeding in that Court, and, section 476 (A) confers certain powers upon a superior Court where the subordinate Court has committed to take action. It is desirable to refer to the terms of the section, which are as follows :—

476-A "The power conferred on Civil, Revenue and Criminal Courts by section 476, sub-section (1), may be exercised in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such Court, by the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), in any case in which such former Court has neither made a complaint under section 476 in respect of such offence nor rejected an application for the making of such complaint; and, where the superior Court makes such complaint, the provisions of section 476 shall apply accordingly"

In my judgment that section does not apply to this case, because there was an application made to the learned Subordinate Judge and the learned Subordinate Judge rejected the application for the making of the complaint.

The next section 476 (B) gives certain rights of appeal not only to the person against whom a complaint has been directed but also to the person whose application for a complaint has been rejected. The words of the section are as follows :—

Appeals.

476 B. "Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under section 476 or section 476 (A) or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3) and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or as the case may be, itself make the complaint which the subordinate Court might have made under section 476, and if it makes such complaint the provisions of that section shall apply accordingly."

Therefore, it appears to me that the scheme of the sections is that, if the Subordinate Court has neither made a complaint under section 476 nor rejected an application for the making of a complaint then the Superior Court may take action and make a complaint. But where, as in this case, the Subordinate Court has rejected the application for the making of such complaint, then the procedure, which is contemplated by the Code, is by way of an appeal to the Superior Court.

This matter came before the learned District Judge by way of

appeal, and in view of the abovementioned sections, the learned District Judge, in my judgment, should have considered whether the appeal was filed within the time specified.

The article in the Limitation Act which applies to this matter is article 154, and the material section of the Act is section 3 which provides that "subject to the provisions contained in sections 4 to 25 (inclusive) every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence."

Under article 154, the period of limitation for an appeal under the Code of Criminal Procedure, 1898, to any Court other than a High Court, is "thirty days" and the time from which the period begins to run, is "the date of the sentence or order appealed from."

It is therefore, clear that, as the order appealed from was made on the 1st of October, 1923 and the appeal was not filed till the 7th of August, 1924, the appeal was out of time.

This Rule therefore must be made absolute, and the order of the learned District Judge of the 31st January 1925, directing criminal proceedings to be instituted against Chunder Kumar Sen must be set aside.

No order need be made as regards the appeal (No. 210 of 1925) in connection with the same matter.

Panton J :—I agree.

A. T. M. *Rule made absolute : No order in Appeal No. 210.*

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Chunder

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Sanderson, C. J.

*Before Sir Lancelot Sanderson, Knight, Chief Justice, and
Mr. Justice Panton.*

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1925.

May, 27, 28.

BEJOY SINGH HAZARI

v.

MATHURIYA DEBYA.*

High Court—Proper order—Rule issued on another ground.

An application was made under section 476 of the Code of Criminal Procedure to the Subordinate Judge for sanction to prosecute the petitioner. He expressed the opinion that "if there be a prosecution there is no likelihood of a conviction. Such being the case I have no other alternative but to reject the application." On appeal, the District Judge ordered prosecution for offences under sections 209 and 466 I. P. C. The High Court being moved, a Rule was issued to show cause why the appeal should not be reheard by the District Judge. On the hearing of the Rule, the High Court came to the conclusion that if the prosecution was ordered there was no likelihood of conviction :

Held, that the High Court was competent to order in such Rule that the application for sanction should be rejected.

That it was competent for the High Court to make any order as it might think fit.

Application for Revision.

Sanction granted under sections 195 and 476 of the Code of Criminal Procedure.

The case of Mathuriya Debya was that Bijoy Singh Hazari knowingly filed verified petition of execution and in collusion and conspiracy falsified the A Register and used the false entries as genuine and thus committed the offences under sections 209 and 466 Indian Penal Code.

Mr. Camell, Babus Narendra Kumar Das and Kiran Kumar Bhattacharjee for the Petitioner.

Mr. B. C. Chatterjee and Babu Paresk Chandra Sen for the Opposite Party.

Mr. Khondkar (Deputy Legal Remembrancer) for the Crown.

The judgments of the Court were as follows :

Panton J : It remains to consider the subject of the other

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*Civil Revision No. 3 of 1925, against the order J. N. Nelson Esq., District Judge of Chittagong, dated the 31st January, 1925, reversing that of Babu Nata Behari Ghosh, Officiating Subordinate Judge of Chittagong, dated the 9th July, 1924.

Rule, No. 3 of 1925, which has been obtained by Bijoy Singh Hazari who is one of the three persons in respect of whom an application was made to the learned Subordinate Judge for the institution of criminal proceedings.

It is necessary to deal very shortly with certain matters which led up to the making of this application. In the year 1910, one Sattan Kumari obtained a decree for arrears of maintenance for Rs. 2,500 against Mathuriya Debya and others. Thereafter, numerous applications for execution of this decree appear to have been made—whether they were in fact made or whether the entries relating to them which appear in the Court registers are forgeries is a matter of dispute. However, the material applications were:—No. 104 of 1911 which the register would show was made by Sattan Kumari. Then again No. 736 of 1914 and No. 1255 of 1918 and finally No. 152 of 1921. Sattan Kumari died on the 20th of March, 1922. By her will, her whole property was bequeathed to the present petitioner Bejoy Singh Hazari. He then made an application in the execution case No. 208 of 1922 on the 5th of January 1922. To this an objection was made that the decree had been satisfied years ago and it has been alleged that there was a conspiracy on the part of Bejoy Singh Hazari, Chunder Kumar Sen who was a clerk in the office of the Subordinate Judge of Chittagong and another person, to forge these records of execution cases with a view to show that this old decree which had in fact been satisfied many years ago was still effective.

An application was therefore made to the learned Subordinate Judge under section 476 of the Criminal Procedure Code to make a complaint against these three persons. The result, as the learned Chief Justice has just pointed out, was the rejection of the application against Chunder Kumar Sen and the other person, but the prosecution went on for sometime as against Bejoy Singh Hazari. The learned Subordinate Judge says in his order "The case of the petitioner is that Bejoy Singh Hazari knowingly filed verified petition of execution and in collusion and conspiracy falsified the register and used the false entries as genuine and thus committed the offences enumerated above." In the result, he expressed the opinion that "If there be a prosecution there is no likelihood of a conviction. Such being the case I have no other alternative but to reject the application."

Thereupon an appeal was taken to the learned District Judge who directed that criminal proceedings should be instituted against

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Bejoy Singh Hazari and Chunder Kumar Sen for offences under sections 209 and 466 of the Indian Penal Code and for abetment of those offences.

It has been urged on behalf of Bejoy Singh Hazari that this order should be set aside and the facts of the case have been gone into at some length before us.

I have, however, very grave doubts as to whether the prosecution which the learned District Judge has directed could possibly come to a successful end. In arriving at this conclusion, I have particular regard to the attitude which the learned Deputy Legal Remembrancer who appears for the Crown, has, if I may say so, very properly assumed in this matter. Moreover, the position of affairs has completely changed now that the prosecution against Chunder Kumar Sen has failed: and I very much doubt whether the learned District Judge, had he had the case of Bejoy Singh Hazari only to consider, would have arrived at the opinion that this man should now be prosecuted. There is further a very important fact this fraud if it was perpetrated, was perpetrated so long ago as 1921, and is said to have come to light in 1923.

In these circumstances my opinion is that the prosecution of Bejoy Singh Hazari is not desirable and should not be ordered.

It is true that the Rule issued by this Court was to show cause why the appeal should not be reheard by the learned District Judge. It is, however, within the competence of this Court to make any such order as it may think fit. In my opinion the proper order for us to make is simply that the order of the District Judge is set aside, the result being that there will be no prosecution of the present petitioner.

Sanderson, C. J.—I agree.

A. T. M.

Proceeding quashed.

CRIMINAL REFERENCE.

*Before Sir Hugh Walmsley, Knight Judge, and Mr.
Justice B. B. Ghose.*

SURENDRA NATH BANERJEE AND OTHERS

v.

SHOSHI BHUSAN SARKAR AND OTHERS.*

CRIMINAL.

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April, 29.

Criminal Procedure Code (Act V of 1898), Secs. 107, 145 sub-section (2)—Dispute regarding performance of puja.

A dispute regarding performance of *Puja* of an Idol does not come under the provisions of section 145 of the Code of Criminal Procedure.

Right to go upon a temple and to perform *Puja* and to take a portion of the offerings made to an Idol is not a 'right of user' of any land as explained in section 145 sub-section (2) of the Code of Criminal Procedure.

If there is such a dispute between the parties leading to a breach of the peace, proceedings may be drawn up under section 107 of the Code of Criminal Procedure.

Reference under section 438 Criminal Procedure Code.

The material facts appear from the following.

Reference.

1. Under section 438 Criminal Procedure Code I herewith transmit the record of the case noted in the margin to be laid before the High Court with the following report :—

2. As there is some dispute regarding the real scope of the case, I make the following quotations from the judgment of the lower Court. "This is an enquiry regarding the right to perform worship (*puja*) of an old Idol named Baidyanath Thakur and the incidental right of user of the temple of the Idol, its *latmandir* (a structure in front of the temple) and the land attached to the temple and *latmandir*. Both parties claim the right to worship the Idol as its shebais (worshippers) and also claim the possession of the temple and *latmandir* together with the land attached to them." "The proceedings under section 147 Criminal Procedure Code were drawn up on the basis of a Police report dated 16-7-24 from P. S. Arambagh in which it was stated that as both parties were fighting over their rights as shebais, there was likelihood of a breach of the peace."

Cr. motion No. 137
of 1924
S. B. Sarkar & or,
v.
S. N. Banerjee &
ors.
With lower Court
record
A brief analysis of
the case.

* Criminal Reference No. 52 of 1925, by N Lahiri Esq, Additional Sessions Judge of Hooghly, dated the 26th February, 1925.

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1925.

Surendra
v.
Shoshi.

The lower Court (S. D. O., Arambagh) after drawing up the proceedings under section 147 Criminal Procedure Code accepted evidence from both parties and by its judgment dated 29-11-24 made the following order:—"It is ordered under section 147 Criminal Procedure Code that the first party will continue to perform the Puja of Baidyanath Thakur and to make user of the temple, *latmandir* and the land attached to them and the 2nd party be prohibited from exercising their alleged right of *puja* and the user of the temple etc. until such right be established by order of competent Court. The 2nd party should pay Rs. 20 as cost to the first party."

The order
recommended for
revision

3. The order recommended for revision is the order quoted above (by the S. D. O., Arambagh) dated 29-11-24 purporting to have been made under section 147 Criminal Procedure Code prohibiting the 2nd party from performing the Puja of the Idol and from using the temple etc. and allowing the 1st party to perform the *puja* and using the temple etc.

In what particular
portion of that
order the Court
making the
reference considers
an error on a point
of law to exist.

4. I am of opinion that the whole of the order is illegal and should be set aside and that the incidental order for costs should also therefore be set aside. Considering the facts of the case, the lower Court had no jurisdiction to draw up proceedings under section 147 Criminal Procedure Code and which are therefore liable to be quashed.

Even if it be held that the lower Court had jurisdiction, then there ought to be a fresh enquiry as Nishapati Chatterji an important witness of the 2nd party had not been examined and the lower Court should pass his order only after examining him.

The grounds upon
which in the opinion
of such Court the
order should be
reversed.

5. It appears to me that the dispute between the parties was regarding the shebaitship of the Idol Baidyanath Thakur. The question of shebaitship does not appear to be included in section 147 Criminal Procedure Code. It is a complicated civil dispute which should be left to the civil Courts to decide. The civil Courts can in appropriate cases give immediate relief by interlocutory orders such as temporary injunction etc.

The rights of a shebait may be considered in two aspects viz. (I) the right to perform the *Puja* and (II) the right to possess the properties of the Idol.

As regards (I) it has been held in the case of *Guiram Ghosal v. Lal Behari Das* (1) that a dispute concerning the right to perform *puja* by entering into a temple is not a dispute concerning the right of use of any land within the meaning of section 147.

(1) (1910) I. L. R. 37 Cal. 578; 12 C. L. J. 22; 14 C. W. N. 611.

The ruling cited in the lower Court's explanation is an old ruling of the Madras High Court and Weirs' reports are not available

As regards (11) if there be any dispute regarding the possession of any immoveable property, the proper procedure is to draw up proceedings under section 145 Criminal Procedure Code.

6. If it be held that the lower Court was competent to draw up the proceedings under section 147 Criminal Procedure Code then there ought to be a fresh enquiry as Nishapati Chatterjee an important witness of the 2nd party had not been examined. Nishapati was summoned by the lower Court. But on 17-11-24 the 2nd party applied for further process for enforcing Nishapati's attendance. The only order passed on that petition is "file." As has been held in the case of *Bhomar v. Digambar* (1) this was not a proper order. The lower Court, having once summoned the witness, could not refuse to grant further process for enforcing his attendance *Daulat v. Brinda* (2)

The lower Court's explanation that the party undertook to produce the witness is not borne out by the record.

7. The other grounds taken by the petitioner for having the order set aside do not appear to be sound. I would only add that it had been held in the case of *Ishan Chandra Samanta v. Hriday. K. Bose* reported in the "Statesman" of the 7th instant that section 360 Criminal Procedure Code has no application.

Dr. Bijan Kumar Mukerji and *Babu Sanat Kumar Bose* for the 1st Party.

Babus Bir Bhusan Dutt and *Sekhar Kumar Bose* for the 2nd Party.

The following judgments were delivered :

B. B. Ghose, J. :—This is a Reference by the Additional Sessions Judge of Hughli recommending that an order passed under section 147 of the Criminal Procedure Code should be set aside.

The dispute between the parties was with regard to the performance of the *puja* of an Idol. There was no dispute as regards the temple or any land belonging to the Idol. The whole question in controversy is whether the right claimed by the first party is a right of user of any land as explained in section 145 sub-section (2) of the Criminal Procedure Code. The right is alleged to be a right to go upon the temple and to perform the *puja* and to take a portion of the offerings made to the Idol.

(1) (1902) 6 C. W. N. 548.

(2) (1902) I. L. R. 30 Calc. 121

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Surendra:

Shoshi:

B. B. Ghose, J.

The learned Sessions Judge is of opinion that this right is not included within the words "right of user of any land." He refers to a decision of this Court in the case of *Guiram Ghosal v. Lal Behari Das* (1), in support of his conclusion.

It is contended on behalf of the first party that that decision proceeded upon the ground that the expression "land" was not defined in section 145 of the Criminal Procedure Code as it then stood and that now that it has been especially enacted that it includes a "building" under the newly added sub-section (2) of section 145, the authority of that case is no longer in force. However that may be, it seems to me that the right to perform the *Puja* of Idol or to have a share of the offerings made to the Idol cannot be said to be a right of user of any land, as provided in section 145 of Criminal Procedure Code, and therefore, the present dispute cannot be considered to be one coming under the provisions of that section.

On this ground I will accept the Reference and set aside the order of the Magistrate in favour of the first party.

If there is such a dispute between the parties, which the Magistrate considers may lead to any breach of the peace he may take such steps he considers necessary under section 107 of the Criminal Procedure Code.

The order for payment of costs is set aside, and the costs, if paid, will be refunded.

Walmsley J :—I agree.

A. T. M.

Reference accepted,

(1) (1910) I. L. R. 37 Calc. 578 ; 12 C. L. J. 22.

Before Sir Hugh Walmsley, Knight, Judge, and
Mr. Justice J. B. Ghose.

W. R. T. FORBES

v.

MAHAMMAD ALI HAIDAR KHAN AND ANOTHER*

Mandatory provision—Disregard, effect of.

Failure to comply with the rule contained in section 530B of the Code of Criminal Procedure in connection with proceedings under section 145 of the Code is an irregularity, and does not vitiate the proceedings in the absence of prejudice: *Hriday v. Emperor* (1) not followed.

Per B. B. Ghose J: There is no universal rule that disobedience of a mandatory provision in a statute has the consequence of nullification of all proceedings irrespective of any question of prejudice. Whether a mandatory provision is imperative or only directory depends upon a consideration of various circumstances.

Reference under section 438 of the Code of Criminal Procedure,
The material facts appear from the following

Reference.

Under section 438 of the Code of Criminal Procedure I transmit herewith the record of the case noted in the margin to be laid before the Hon'ble Court with the following report:

I. A brief analysis of the case:—

This reference relates to a proceeding under section 145 Criminal Procedure Code in which the parties were the Kaliti Tea Estate on one side and the present petitioners (representing the Prithimpasa Estate) on the other. The dispute which led the learned Magistrate to apprehend a breach of the peace was regarding a certain piece of land where coal had been discovered and was being worked. The learned Magistrate after holding a local inquiry (on 24. 2. 24) and taking evidence, passed orders (on 25. 3. 24) declaring the Kaliti Tea Estate to be in possession and forbidding its disturbance until ouster by due course of law.

(II) The order recommended for revision:—

The order declaring the Kaliti Tea Estate to be in possession.

(III) The grounds upon which the order should be reversed:—

The learned Magistrate held the local inquiry on 24th February

*Criminal Reference No. 36 of 1925, by B. N. Rau Esq., Sessions Judge of Sylhet, dated the 2nd February, 1925.

(1) (1924) 40 C. L. J. 149.

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April, 28, 29.
May, 13.

Syl. Motion No.
28-2 of 1914. Ali
Haidar Khan and
another. Petitioner

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v.
Haidar.

1924, but recorded no note of inspection as required by section 539 Criminal Procedure Code. He has frankly stated in his explanation that he was not aware of the new section. It is argued on behalf of the petitioners that the omission has prejudiced them seriously. It is said, for instance, that the learned Magistrate did not find any recently cut jungle between the shed and the Garden Manager's Bungalow, that he did not find any coal shaft near the disputed one, &c., and that all these facts, which would have appeared in the inspection-note, if the Magistrate had recorded one at the time, were lost sight of when the Magistrate was writing his judgment about a month later. It is further contended that if the petitioners had known how much the Magistrate had noticed or failed to notice during the local inquiry, they could have produced evidence to correct any errors or defects of observation. As it was, it is urged, they did not know until judgment was delivered what impressions he had formed as the result of his inspection.

It is unnecessary to discuss the merits of these arguments, for according to the ruling in *Hriday Govinda Sur v. Emperor* (1), the omission to record an inspection-note as required by section 539 B., Criminal Procedure Code, is an illegality which cannot be cured by proving absence of prejudice. I therefore recommend that the order passed under section 145 Criminal Procedure Code be set aside. The question of drawing up a fresh proceeding must necessarily depend on whether there is still a likelihood of a breach of the peace and may therefore be left open. The Magistrate's explanation is sent in original along with the record.

Sir B. C. Mitter and *Babu Preonath Dutt* for the First Party.

Mr. B. Chuckerbutty and *Moulvi Amiruddin Ahmed* for the Second Party.

C. A. V.

The judgments of the Court were as follows :

May, 13.

• **Walmsley J.**—This case comes before us on a reference made by the Sessions Judge of Sylhet under the provisions of section 438 Criminal Procedure Code.

In a proceeding under section 145 Criminal Procedure Code, the Sub-Divisional Magistrate declared the first party to be in possession of the disputed land, by an order dated March 25, 1924. The learned Judge recommends that this order be set aside on the ground that the Magistrate after making a local enquiry did not

(1) (1924) 40 C. L. J. 149.

record a memorandum of the relevant facts which he observed. The rule which requires such a memorandum to be made was enacted by Act XVIII of 1923, and is contained in section 539 B of the Code as it is after amendment. It does not, however, introduce any new principle, for this Court had often laid down that a memorandum should be prepared, so that both sides to an enquiry or trial might know what the Magistrate during his enquiry had noticed or failed to notice.

It is the form of the rule that creates difficulty. It runs "Any Magistrate may...and shall record a memorandum...Such memorandum shall form part of the record of the case." The learned Judge refers to a decision by a Divisional Bench of this Court in the case of *Hridoy Govinda Sur v. Emperor* (1), where it was held that the rule contained in the second clause of the section, that is the rule which directs that the memorandum shall form part of the record, was mandatory, and that failure to comply with it was an illegality and not an irregularity which can be cured. With all deference to the learned Judges I venture to doubt whether that result does follow from applying the epithet mandatory. The decision, however, was in a trial for an offence whereas in the case before us there was no accused person before the Court and the only question was which of two parties was in possession of land, and which should shoulder the burden of instituting a civil suit. In such a proceeding I think that we are entitled to consider what action the petitioners took in regard to the writing of a memorandum. I have already pointed out that the requirement of section 539 B introduced no new principle. The local enquiry was made in the presence of the petitioner's pleader: he knew exactly where the Magistrate went, and the points to which his attention was drawn. The petitioners through their pleader must be assumed to be familiar with pronouncements so often made by this Court that a memorandum should be recorded. They did not however ask the Magistrate to record a memorandum, or to attach a memorandum to the record or to give them a copy. They were content to go on to judgment without seeing the memorandum, or even ascertaining whether one had been made. I do not think that they can now be allowed to say that for this formal defect the proceedings should be set aside, unless they can show that the Magistrate's omission has caused them prejudice.

As to prejudice, it is quite true that the learned Magistrate referred to what he had seen, and to the conclusions which he

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drew, but those remarks are redundant, for the findings on the evidence adduced by the parties are summed up in these words: "I can say with conviction that I consider the first party's evidence to be true, and I can say with even more conviction that I consider the second party's evidence to be a mess of lies and fictions supported by documents which must have been specially made for the occasion."

In these circumstances I hold that sufficient reason has not been made out for interference, and I reject the reference.

B. B. Ghose, J. :—I agree that this reference should be rejected. I only desire to add that there is no universal rule that disobedience of a mandatory provision in a statute has the consequence of nullification of all proceedings irrespective of any question of prejudice. Whether a mandatory provision is imperative or only directory depends upon a consideration of various circumstances. It seems to me that the observations in *Hriday Govinda v. Emperor* (1) are too wide.

A. T. M.

Reference rejected.

(1) (1924) 40 C. L. J. 149.

APPELLATE CIVIL.

*Before Sir Ewart Greaves, Knight, Judge, and
Mr. Justice Chakravarti.*

PRASANNA KUMAR DE MAHAJAN

v.

NANIGOPAL DE.*

CIVIL.

1924

July, 10.

Suit for rent—Land Registration Act (VII B. C. of 1876), Sec. 78—Owner not registered—Lessee, if can sue—Assignee of rent—Entry in Khatian—Part acceptance.

Section 78 of the Land Registration Act is no bar to a person recovering rent

*Appeal from Appellate Decree No. 2210 of 1921, against the decree of Babu Nagendra Nath Bhattacharjee, Additional Subordinate Judge of Chittagong, dated the 20th June, 1921, reversing that of Babu Kunja Behari Roy, Munsiff of Hathazari, dated the 10th April, 1920.

although the person who should have been registered as the proprietor and through whom he claims, has not been so registered.

Section 78 of the Land Registration Act is inapplicable to the case of an assignee of rent, though the name of the assignor has not been registered under the Act : *Syed Serapat v. Tarini* (1).

The Court can accept a part and not accept the rest, of the entry in a *Khatian*.

Appeal by Defendant No. 4.

Suit for rent.

The material facts appear from the judgment.

Babu Chandra Sekhar Sen for the Appellant.

Babu Biraj Mohan Majumdar for the Respondent.

The judgment of the Court was as follows :

This is an appeal by the defendant against a decision of the Additional Subordinate Judge of Chittagong reversing a decision of the munsif. The suit out of which this appeal arises was a suit for rent. The plaintiff's claim was that defendant No. 18 was the proprietor of a certain *taluq* and that defendant No. 18 had leased this out in *Sadar Patni* right to the plaintiff in March 1915 and that at the same time four years' arrears of rent from 1911 to 1915 had been assigned by defendant No. 18 to the plaintiff. The plaintiff further claimed that the defendants other than defendant No. 18 were tenants under him and claimed rent at the rate of Rs. 17-8 as a year. The case for the defendants, other than defendant No. 18, was that they were neither the tenants under defendant No. 18 nor under the plaintiff and they asserted that neither of these persons had any title to any of the land. They say that their landlord was some other person named Raj Chandra Sen and that they had been paying rent to him all along. The first Court dismissed the suit but the Subordinate Judge held that the provisions of section 78 of the Land Registration Act, Act VII of 1876 were no bar to the claim by the lessor.

Four points have been urged before us on behalf of the appellant. First, it is said that section 78 of the Land Registration Act is a bar to the claim. Secondly, it is said that the learned Subordinate Judge has relied for his decision upon the admissions of certain co-tenants of the defendants which, it is said, are not evidence against them. Thirdly, it is said that defendants 3 and 15 have died and that no substitution has been effected and that without the substitution the suit cannot lie. Fourthly, it is said that

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(1) (1905) 11 C. W. N. 141.

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the learned Subordinate Judge must be deemed to have accepted the entry in the *khattian* and that that being so, he should have dismissed the suit.

As to the first point there are decisions of this Court that section 78 is no bar to a person in the position of the present plaintiff recovering rent although the person who should have been registered as the proprietor and through whom he claims has not been registered. One of the rents which are claimed in the suit was claimed by virtue of the assignment and it is suggested that so far as this rent is concerned section 78 is a bar. This Court, however, has otherwise decided [See *Syed Serapat Hossein v. Tarini Prosad Dohy* (1)]. In the circumstances, we think that there is no substance in the first point.

So far as the second point is concerned, it appears that there was evidence on the record apart from the admissions upon which the learned Judge is said to have relied for it appears that the plaintiff examined the landlord's *gomasta* and that he deposed to the realisation of rent of the *talug* from the defendants and proved the counterfoils showing such realisation. It therefore appears that the learned Judge relied on other evidence than the mere admissions of the co-tenants.

So far as the third point is concerned this was not taken in the Courts below and we do not think that it is open to the appellant here.

As regards the fourth point, we think that it was open to the learned Subordinate Judge as he did to accept a part of the entry in the *khattian* and not to accept the rest of the entry. There is, accordingly, nothing in this point.

In the result, the appeal fails and must be dismissed.

The Deputy Registrar's costs as representing the minor-respondents have already been paid.

A. T. M.

Appeal dismissed.

(1) (1906) 11 C. W. N. 141.

*Before Sir Hugh Walmsley, Knight, Judge, and Mr. Justice
B. B. Ghose.*

RAKHAL CHANDRA MONDAL

v.

GOUR GOPAL DUTTA AND OTHERS.*

CIVIL.

1924.

December, 19.

Costs—Discretion—Appellate Court.

The Court which tries a suit has full power to determine by whom the costs are to be paid. The appellate Court has no authority to interfere with such discretion.

Appeals by Defendant No. 1.

Application for setting aside a putni sale.

The material facts appear from the judgment.

*Babus Hiralal Chuckerbutty, Upendra Narain Bagchi and
Satindra Nath Roy Chowdhury* for the Appellant.

*Mr. S. C. Roy Chowdhury, Babus Krishna Kamal Maitra,
Bejoy Kumar Bhattacharjee, Bireswar Bagchi, Jatindra Mohan
Chowdhury, Pannalal Chatterjee and Girija Mohan Sanyal* for the
Respondents.

The judgments of the Court were as follows :

Walmsley J :—These two appeals are directed against a judgment which disposed of two applications for setting aside a sale held under the provisions of Regulation VIII of 1819. The suits were brought one by the putnidar and the other by one of the durputnidars and the allegations were that there had been fraud on the part of the durputnidars defendants Nos. 3 to 6 who had agreed to pay the rent to the landlord and that the said durputnidars had further committed fraud by engaging a benamdar to buy the property. It was also said that the notices required to be served under the law had not been properly served by the landlord. Now, the learned Judge went into the questions of fact and found that the durputnidars defendants Nos. 3 to 6 who had agreed to pay the rent had abstained from doing so and brought about the sale in order to purchase the putni themselves and that they had engaged a benamdar to purchase the property when the sale took place. He also found that the notices were not properly served in accordance

December, 19.

*Appeals from Original Decrees Nos. 307 and 308 of 1922, against the decrees of Babu Srish Chandra Banerjee, Subordinate Judge of Rajshahye, dated the 22nd May, 1922.

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Walmsley, J.

with the law. He thereupon ordered that the sale should be set aside. His order as to costs was that the defendant No. 1, that is, the present appellant—the landlord should pay the costs of the plaintiffs and that the other defendants should bear their own costs in both the suits. Now, the costs for which the landlord has been made liable amount to Rs. 1758 odd in one suit and to Rs. 886 odd in the other and the appeals are preferred by the defendant No. 1 the landlord against this order as to costs.

An objection is taken on behalf of the respondents—the durputnidars that no appeal lies against such an order. I think that is right. Under the present Code of Civil Procedure, the Court which tries the suit has full power to determine by whom the costs are to be paid. The words of the section are “the costs incidental to all suits shall be in the discretion of the Court and the Court shall have full power to determine by whom such costs are to be paid.” Unless we read those words in a very restricted meaning which has not been the practice in this Court, I think it is clear that we have no authority to interfere with the learned Judge’s discretion. I think further that the learned judge exercised his discretion with considerable care. It is impossible to read his judgment without coming to the conclusion that it was the zemindar who contributed to the length of the case by his attitude. Further, there is this peculiar feature of the final order that the learned Judge did not order reconveyance of the property but simply set aside the sale. He also pointed out that the zemindar recovered all the rents due to him. I think, therefore, on that ground, the learned Judge had discretion to deal with the matter of costs and he exercised that discretion, so far as I can see with care. For the reasons given I am of opinion that we ought not to interfere with the order complained of. The result, therefore, is that these appeals are dismissed with costs—three gold mohurs in each case—two gold mohurs in each case to the durputnidars respondents represented by Babu Girija Mohan Sanyal, one gold Mohur to Babu Bireswar Bagchi’s client in appeal No. 307 and one gold mohur to Babu Jatindra Mohan Chowdhury’s client in appeal No. 308.

B. B. Ghose, J. :—I agree.

A. T. M.

Appeal dismissed.

CRIMINAL REVISION.

*Before Sir Babington Bennett Newbould, Knight, Judge, and
Mr. Justice B. B. Ghose.*

SRISH CHANDRA GHOSE AND OTHERS.

v.

ABANI NATH HAZRA

CRIMINAL.

1925.

March, 2, 3.

*Compromise—Agreement to refer to arbitration—Objection to award—Criminal
Procedure Code (Act V of 1898), Sec. 345—Intention.*

In a proceeding under section 427 I. P. C., both parties filed a petition of compromise agreeing to be bound by the decision of arbitrators named therein and asked for adjournment for settlement of their dispute. The arbitrators made an award, which was objected to by the opposite party. On application to record an acquittal under section 345 of the Code of Criminal Procedure, the Magistrate held that the case had not been compounded and that the trial should proceed.

Held, that the agreement to refer the case to arbitration was not a final settlement of the dispute which the Court was bound to accept.

That it was not the intention of the parties to treat the reference to arbitration as taking the case out of the jurisdiction of the criminal Court.

Application by the Accused for Revision under section 435 of the Code of Criminal Procedure.

The material facts appear from the following judgment of the lower Court.

"Application no. 234 dated 21-7, 24.

This is an application made by the accused person (petitioners) on 21-7-24, asking the Court to record an order of acquittal in their favour under Section 345 Criminal Procedure Code, on the ground that complainant (opposite party) had compounded out of Court the offence with which they were charged.

It appears that on the complaint of Abani Nath Hazra (opposite party) Srish Chandra Ghosh and 4 others (petitioners) were duly placed on trial to answer a charge under section 427 I. P. C. on 21-6-24, both parties through their Muktiars made an application (No. 152) in Court, promising to be bound by the decision of 5 gentlemen in the matter nominated by them and named in the application and asking the Court to grant an adjournment for the settlement of their dis-

*Criminal Revision No. 1095 of 1924, against the order of B. Mukherji Esq. Sessions Judge of Murshidabad, dated the 5th December, 1924, confirming that of Babu J. M. Chowdhury, Deputy Magistrate of Berhampur, dated the 5th September, 1924.

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pute. The offence being a compoundable one, the application was granted and the case adjourned to 9-7-24. On that date, the parties appeared in Court and made another application (No. 192) for time, alleging that the 5 arbitrators appointed by them could not inspect the locality. They cut down the number of arbitrators to 3, who were Babu Moho Mohon Sen (Government Pleader who was appearing for the defence in this case), Babu Purna Chandra Chatterjee (prosecuting muktia) and Babu Dhiraj Chandra Roy (prosecuting pleader), and, as before, promised to be bound by the decision of these 3 gentlemen. The 3 arbitrators visited the locality on some day prior to 27. 7. 24 (to which date the case had been adjourned on the prayer of both parties). They sat at the Charaktola (a public place of worship) in the village and the Naib of the Maharaja of Kassimbazar was called. In the course of discussion, as proved by Babu Moho Mohon Sen (examined by the petitioners during this enquiry), some unpleasantness occurred between Purna Babu (the prosecuting muktia and one of the arbitrators) and the Naib, as a result of which Purna Babu ceased to take any further part in the deliberations and the 2 remaining arbitrators, having regard to public convenience and the condition of the locality, arrived at a decision, which was communicated to Purna Babu, who, however, expressed neither assent nor dissent thereto. The petitioners agreed to the decision (to which, as Moho Babu says, Purna Babu was no party), but the opposite party, although personally present, said nothing. Subsequently, while the 3 arbitrators were returning from the Charaktola Moho Mohon Babu came to learn that the opposite party would not agree to the decision of the arbitrators. On 21. 7. 24, the petitioners made the application (No. 234) mentioned above, alleging that the 3 arbitrators had pronounced their unanimous verdict on the spot in the presence of both parties and that the case could not further proceed.

The above facts, which have been elicited during the enquiry held by me on the prayer of the petitioners, are undisputed, and the only point I am called upon to determine at the stage is whether the offence had been actually compounded out of Court, as alleged by the petitioners.

Although reference to arbitration is a thing unknown in criminal law it is contended by the learned vakil appearing for the petitioners that the same is founded upon principles of justice and equity and that those principles should apply to a criminal trial as well. The learned vakil frankly admitted that he can produce no authority, which wholly supports his contention, but has asked the Court to

accept as a well established principle of law the proposition that the parties should not be encouraged to resile at their sweet will from the position they had taken up before a Court after due deliberation. Among others, he has cited in support of his contention two cases, *Emperor v. Mulo* (1), decided in 1912 and the other *Md. Kami Rowther v. Pattani Insyathalla Sahab and 5 others* (2) decided in 1915. In the first case, in which reference was made to the case of *Murry v. Queen Empress* (3), which followed the principle regarding the composition of an offence laid down in the Calcutta case, the Judicial Commissioners directed the trying Magistrate to take evidence about the alleged composition of the offence out of Court and expressed an opinion that if such a composition were proved (although effected out of Court) it would operate as a complete bar to further proceeding with the case. In the second case, 3 separate cases had sprung up between the same parties. The first two had ended in the conviction of the accused and were pending in the appellate Court, while the third was in the file of the trial Court. In the appellate court, a petition of compromise (covering all the 3 cases) was filed by the parties and the first two cases compromised with the permission of the Court. While the third case was taken up by the trial Court the petitioner (who was the appellant of that case) resiled from the position he had taken up in the appellate Court with regard to the third case and alleged that that case had not been compromised. Their Lordships of the Madras High Court held that the petitioner was bound by the petition of compromise which both parties had filed in the appellate Court and which covered the third case as well, and ruled that there had been a valid composition of the offence in the third case, which could no longer proceed.

Mr. Narendra Kumar Bose and Babu Kanaidhan Dutt (for *Babu Nirode Baran Banerjee*) for the Petitioners.

Babu Satindra Nath Mukherjee for the Opposite Party.

The judgment of the Court was as follows :

A case was pending against the petitioners in which they were charged with an offence punishable under section 427 I. P. C., the opposite party being the complainant in that case. The offence is one which is compoundable under section 345 Cr. P. C. without the leave of the Court. On the 21st June 1924 both parties filed a petition of compromise agreeing to be bound by the decision of five gentlemen named therein and asking the Court to grant an adjourn-

(1) (1912) 19 I. C. 948.

(2) (1915) I. L. R. 39 Mad. 946.

(3) (1893) I. L. R. 21 Calc. 193.

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ment for settlement of their dispute. On the 9th July another joint petition was filed reducing the number of arbitrators to three. The three arbitrators visited the locality, but while they were making their enquiry some unpleasantness occurred and one of the arbitrators ceased to take any further part in the deliberation. The two remaining arbitrators made an award which was not accepted by the opposite party. An application being made by the petitioners to the trying Magistrate to record an order of acquittal under section 345 he held that the case had not been compounded and that the trial should proceed.

The only question that arises in this Rule is whether these petitions filed on the 21st June and the 9th July 1924 had the effect of compounding the case within the meaning of section 345 of the code. We think the magistrate is right in holding that it cannot be said that the agreement to refer the case to arbitration was a final settlement of the dispute which the Court was bound to accept. The fact that when agreeing to be bound by the decision of the arbitrators the parties asked for adjournment of the case shows that it was not their intention to treat the reference to arbitration as taking the case out of the jurisdiction of the criminal Court. The decision of the arbitrators whatever it was could not have been enforced by the criminal Court, and it is unlikely therefore that the parties would have considered that the reference to arbitration was the final ending of the dispute. What was probably contemplated was that the arbitrators should go into the matter and in accordance with their decision the parties would act and after effect had been given to their decision by mutual agreement the case should then be compromised, but that it should be kept pending until it was finally settled.

We accordingly discharge this Rule.

A. T. M.

Rule discharged.

PRIVY COUNCIL.

PRESENT.—*Lord Sumner, Lord Blanesburgh, Sir John Edge,
Mr. Ameer Ali, and Lord Salvesen.*

NOWROJI RUSTOMJI WADIA

v.

GOVERNMENT OF BOMBAY.*

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April, 30.

May, 1.

June, 12.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

*Appeal—Land Acquisition Act (I of 1894)—Compensation—Undeveloped land—
Value—Practice of Privy Council in such appeals.*

The Privy Council will entertain appeals in compensation cases under the Land Acquisition Act only on questions of principle, where there has been errors in law including errors in appreciating or applying the rules of evidence or the judicial methods of weighing evidence, and not upon questions of value, which latter are, in matters both of fact and law, the proper subject of appeal to the Courts in India, possessing specific local knowledge and experience; and the Privy Council will not review the decree of an Indian appellate Court merely upon questions of value: *Secretary of state v. General Steam Navigation Co.* (1); *Rangoon Botatoung Co. v. Collector, Rangoon* (2); *Charandas v. Amir-khan* (3); *Narsingh Das v. Secretary of State* (4); *N. Luchmeedavamah v. V. Naidoo* (5); *Umroo Begum's case* (6), referred to.

The value to be placed at a given moment on a plot of land, which is not in the market or the subject of bargain and sale, but owes a large part of any value it possesses to the prospective results of development work to be undertaken thereafter at an uncertain time and at an estimated cost, is a question of fact

Appeal from a decree of the High Court (Macleod, C. J. and Shah, J.—20th September, 1921) modifying a decree of the same Court (Kajiji, J.—30th August, 1920) on a reference thereto under the Land Acquisition Act.

On the 22nd December, 1912, the appellant agreed to buy for Rs. 50,204 certain vacant undeveloped land near the junction of Delisle and Arthur Roads, Chinchpokli, Bombay, of the area of 22,312 sq. yds.; and on the 10th February, 1915 he paid for and

(1) (1909) I. L. R. 36 Calc. 967; 10 C. L. J. 281.

(2) (1912) L. R. 39 I. A. 197 (201); I. L. R. 40 Calc. 21; 16 C. L. J. 245.

(3) (1920) B. R. 47 I. A. 255 (264); 25 C. W. N. 289.

(4) (1924) L. R. 52 I. A. 133.

(5) (1861) 9 M. I. A. 66 (87); 1 W. R. P. C. 30.

(6) (1894) L. R. 21 I. A. 163; I. L. R. 21 Calc. 997.

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obtained a conveyance of the same. In 1917, the respondent, through the Collector, acquired the land for the Bombay Municipal Corporation for the extension of the Hospital for Infectious Diseases, and awarded Rs. 98,724 as compensation, i. e., at Rs. 8 per sq. yd. less a small discount to allow time for disposal of the plots. Upon a reference to the High Court under section 18 of the Land Acquisition Act, Kajiji, J. awarded Rs. 10 per sq. yd. i. e., Rs. 1,39,970 on the 30th August, 1920. The Court of appeal (MacLeod, C. J. and Shah, J.) on the 20th September, 1921 reversed the decree of Kajiji, J. and restored the award of the Collector. The appellant appealed to His Majesty in Council.

Sir G. Lowndes, K. C. and B. B. Raikes for Appellant.

A. M. Dunne, K. C. and A. M. Talbot for Respondent.

The judgment of the Board was delivered by

June, 12.

Lord Sumner : In 1917 the Municipality of Bombay acquired a plot of land for purposes connected with an existing hospital, and the usual statutory proceeding took place before the Collector of Bombay to fix the amount of compensation to be paid for the land. The owner, being dissatisfied with the amount awarded, viz., Rs. 98,724, claimed a reference to the High Court, and in 1920 Kajiji, J., varied the Collector's award by increasing the rate to be allowed per square yard superficial from Rs. 8 to Rs. 10. This raised the total compensation to Rs. 1,39,970. Upon an appeal by the Municipality the High Court set aside the learned Judge's decree and dismissed the reference. They thus in effect confirmed the Collector's award. From this decision the claimant now appeals.

The value to be placed at a given moment on a plot of land, which is not in the market or the subject of bargain and sale, but owes a large part of any value it possesses to the prospective results of development work, to be undertaken thereafter at an uncertain time and at an estimated cost, is not only in its essence a question of fact but is one upon which, almost above any other, opinions will differ, without its being possible to give irrefragable reasons for any particular conclusion.

It has been declared in decisions of the Board, by which their Lordships are now bound, that appeals in valuation cases will only be entertained on questions of principle. [See *Secretary of State v. General Steam Navigation Co.*, (1); *Rangoon* case (2), per Lord Macnaghten; *Charandas v. Ameer Khan* (3), per Lord Buckmaster—

(1) (1909) I. L. R. 36 Calc. 967.

(2) (1912) L. R. 39 I. A. 197 (201).

(3) (1920) L. R. 47 I. A. 264.

"this Board will not interfere with any question of valuation"—and *Rai Bahadur Lala Narsingh Das v. Secretary of State for India* (1), 5th December, 1924. No. 40 of 1924.] Errors in law, including errors in appreciating or applying the rules of evidence or the judicial methods of weighing evidence, are matters that can and will be dealt with on appeal by this Board, but when, as in the present case, a difference of opinion has occurred between two Indian Courts upon the number of rupees per yard to be allowed for a plot of land, as to which their Lordships can form no opinion of their own, it would be alike unprofitable and impracticable to embark on a comparison of the decisions of these Courts. In cases relating to the acquisition of land the whole matter, both of fact and law, is a proper subject of appeal in India, for their local knowledge and experience enable the learned Judges to form useful judgments upon the whole case. The amending Act of 1921 declares awards under the Land Acquisition Act, 1894, to be decrees so as to bring them within the general rules as to appeals to this Board, but it does not prescribe any special mode, in which they are to be treated. This Board has found it necessary to limit the extent of the inquiry, in order to spare the parties costly and fruitless litigation. Just as in cases where there are concurrent findings of fact in the Indian Courts, it has long been the general rule of the Board not to allow such findings to be re-opened here [*Naragunty Luchmeedavamah's* case (2); *Umroo Begum's* case (3), so it has now been settled that this Board will not review the decree of an Indian appellate Court merely upon questions of value. Where their Lordships have neither the materials nor the experience on which to found an opinion of their own, in a matter where the opinions of competent Courts in India differ (and *a fortiori* where they concur), it is not their practice to interfere, as an appellate tribunal, unless there appears to be error in law or miscarriage of justice.

In view of this practice the present case may be shortly dealt with. The plot to be acquired was irregular in shape and contour. Except at one point, and there only by a narrow passage, it had no access to any road. Part of it was hollow and lowlying, so that in the rains water accumulated there to the depth of several feet. No transactions were proved in respect of land closely adjacent to or precisely similar to this plot and such transactions as had occurred were cases of development and sale at dates not at or about the material time, viz., 1917. The question, whether or not there

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(2) (1861) 9 M. I. A. 66 (87).

(3) (1894) L. R. 21 I. A. 163

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had afterwards been an upward trend in market values generally, was not only highly disputable as a matter of opinion, but was not affirmatively supported by any satisfactory proof.

Both parties admitted that the most satisfactory use, to which the land could be put, was the erection of workmen's dwellings, and the value of the land for this purpose accordingly became the question to which both directed their attention. Development of this kind required the dedication of a considerable part of the surface, in order to provide an access road, and also the raising of the whole surface to one level, free from risk of flooding, by permanently filling in the cavities with suitable loose material. Estimates of the area of land required for the road and of the cost of filling in per cubic yard were accordingly prepared, and were agreed on both sides. It does not appear, however, that any allowance was made for the time required to enable the made ground to settle, or for the risk that unexpected settlements might take place, and probably these factors were beyond any exact estimation. Of course the circumstances that might exist, when the work was done and the realisable value of the developed site could be ascertained, were alike beyond human foresight.

Kajiji, J., appears to have addressed himself to the question of the fair compensation for land taken in 1917, to be allowed as at that date, as if it were an algebraic problem, which could be solved by an abstract formula. He sought to ascertain what value per yard the land might be supposed to have, if improved at some uncertain date, by treating the cost of filling in the cavities as a determined sum, to which there could not be any addition, and by deducting this sum alone from the supposed realisable value after future development. From these somewhat abstract factors he arrived at a concrete rate per superficial yard to be paid presently by way of compensation. In doing so he took no account of the factor of interest on the cost of the filling in and the other development work during the uncertain interval before the time of realisation might arrive.

From his conclusions thus arrived at the High Court dissented. Their reasons are not very clearly given, but this may be due to the fact that the evidence, which they discussed, is not very clearly recorded. At any rate, as it appears to their Lordships, they fell into no error of principle in their criticisms of the judgment of Kajiji, J., or in the process by which they arrived at their own conclusions. In dissenting from the method, which the learned Judge seems to have followed, they were certainly right. Factors

such as he omitted to notice may be of great importance or of little, or even may be truly negligible according to the circumstances of the particular case, but it cannot be right to ignore them altogether, as having no place at all in a rigid system of calculation. They were guided by their own view, as they were entitled to be, of the weight of the various pieces of evidence, nearly all of indirect bearing on the problem in hand—and in many cases only imperfectly developed. They thought, as they were entitled to think, that the grounds, on which the supposed rise in general market values was rested were so unsubstantial in themselves and so distantly related to the circumstances of the site in question, as not to amount to any evidence on which to rest the judicial conclusion that something should be allowed for a rising market.

After carefully examining the evidence and the way in which the High Court appears to have dealt with it in arriving at the conclusion now under appeal, their Lordships are unable to find that there has been any error in principle or in law in the method of arriving at it. They will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

T. L. Wilson & Co : Solicitors for Appellant.

Solicitor, India Office : Solicitors for Respondent.

A. DE. M.

Appeal dismissed.

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PRESENT—*Lord Atkinson, Lord Shaw, and Lord Darling.*

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1925.

May, 27, 25.

June, 23.

HIRA BIBI AND OTHERS

v.

RAM HARI LAL AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA.]

Mortgage—Mortgage by purdanashin lady—Attestation—Transfer of Property Act (IV of 1882), section 59—Evidence Act (I of 1872), section 70.

A mortgage purporting to be executed by a *purdanashin* lady, and bearing on it by way of attestation, the signatures of persons who were not present at her execution thereof, is not attested in the manner required by section 59 of the Transfer of Property Act and is therefore void as against her : *Shamu Patter v. Abdul Kadir Ravuthan and others* (1); *Bryan v. White* (2); and *Ganga Fershad Singh v. Ishri Fershad Singh* (3) referred to; *Padarath v. Ram Nain Upadhia* (4) distinguished.

Section 70 of the Evidence Act applies to a document duly attested. A document is not duly and legally attested, within the meaning of section 70 of the Evidence Act if it is merely signed by persons who, though professedly witnesses to its execution, were in truth and in fact, not so.

Appeal from decree (10th June 1921) of the High Court (Das and Adami, JJ.) which partly affirmed and partly reversed a decree (26th Sept. 1917) of the District Judge of Patna (R. L. Ross, Esq.).

The facts of the case sufficiently appear from the judgment of their Lordships.

De Gruyther K. C. and *W. Wallach* for the Appellants.

Sir G. Lowndes K. C. and *E. B. Raikes* for the Respondents.

The judgment of the Board was delivered by

Lord Darling.—This is an appeal from a judgment and decree, dated 10th June, 1921, of the High Court of Judicature at Patna, partly affirming and partly reversing a judgment and decree of the District Judge of Patna. The suit was brought to enforce a mortgage dated 17th August, 1905. It was pleaded by the defendants (appellants) that the mortgage bond is void by reason of its not

(1) (1912) L. R. 39 I. A. 218; I. L. R. 35 Mad. 607; 16 C. L. J. 596.

(2) (1850) 2 Rob. Ecc. 35.

(3) (1918) L. R. 45 I. A. 94; 27 C. L. J. 548.

(4) (1915) L. R. 42 I. A. 163; I. L. R. 37 All. 474; 22 G. L. J. 165.

being attested in accordance with the provisions of the Transfer of Property Act IV of 1882, section 59.

The only important question upon this appeal is in regard to the appellant Musammat Hira Bibi and her liability on the mortgage bond. It is admitted that she actually signed the bond, but it is a document which requires attestation by witnesses, as is provided by statute.

Hira Bibi is a *pardanashin* lady. The evidence shows, beyond contest, that when Hira Bibi signed the mortgage bond not one of the persons who signed as witnesses was present or saw her sign it. She was behind the *pardah*. Anant Prasad, her son, took this deed, and others, inside the *pardah*. He came out and told those outside, and out of sight of Hira Bibi, that she had signed the deed, and after this all those signed whose names appear as witnesses.

The learned Judges from whose judgments this appeal is brought have themselves declared that this is wholly insufficient to comply with the statute relating to the due execution and attestation of such a document as this mortgage bond, but they have held that the deed is good as against Hira Bibi, because she has admitted that she signed it.

Mr. Justice Das—with whose judgment Mr. Justice Adami agreed—put the case thus :

"If the matter were *res integra* I should doubt whether the admission of a party can render valid that which is invalid. The question is—Is the rule enunciated in section 59 of the Transfer of Property Act a rule of law affecting the validity of the mortgage or is it a rule of evidence affecting the proof of the document? If it be a rule of evidence the question becomes one of proof and the admission of a party would be in the circumstances quite sufficient. But if it be a rule of law then it is difficult to understand how the admission of a party helps the solution of the problem. My own view is that section 70 of the Evidence Act operates only where the mortgagee has not given any evidence at all of due execution of the document by the mortgagor, but relies on the admission by the mortgagor. If, for instance, the mortgagor admits the execution of the document in the written statement it is wholly unnecessary for the mortgagee to adduce any evidence as to the execution of the document. But the matter would stand on an entirely different footing if the mortgagee produces his evidence of execution and that evidence establishes that the document was not attested in the manner required by section 59 of the Transfer

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of Property Act. I am, however, bound by the decisions of the Calcutta High Court and of this Court. In accordance with those decisions I must hold that the admission of the defendant renders it unnecessary for the plaintiffs to prove that the document was executed and attested in the manner required by section 59 of the Transfer of Property Act."

It appears, then, that the Judges of the High Court of Patna would have held that this mortgage bond was not duly executed by the appellant, Hira Bibi, had they not felt bound to follow earlier decisions of that Court and of the High Court of Calcutta. They appear to have been unaware of several cases decided on appeal by this Board, and directly dealing with the matter in question. When these are considered it appears to their Lordships that this case is already concluded by authority. It is needless to do more than to call attention to them very briefly :—

Shamu Patter v. Abdul Kadir Ravuthan and others (1) decides that to be a good signature attested by two witnesses, within the Transfer of Property Act, 1882, section 59, the persons signing as witnesses must be present at the execution of the instrument. Their Lordships adopted these words of Dr. Lushington (in *Bryan v. White* (2), "Attest, means the persons shall be present and see what passes, and shall when required, bear witness to the facts." And they followed the decision of the House of Lords in *Burdett v. Spilsbury* (3) to the same effect.

The case of *Padarath v. Ram Nain Upadhia* (4), is in its material facts totally different from this one, and has, therefore, no bearing on the question here to be decided. But another case—*Ganga Pershad Singh v. Ishri Pershad Singh* (5)—is in almost all particulars identical with this present one, and in that instance the mortgage deed was declared to be void as not being duly executed and attested.

These cases sufficiently confute the argument founded upon the words of section 70 of the Indian Evidence Act, 1872, that—

"The admission of a party to an attested document, of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested."

Those words apply only to a document duly attested. The mortgage deed here in question was not, in a legal sense, attested ;

(1) (1912) L. R. 39 I. A. 218.

(2) (1850) 2 Rob. Ecc. 315.

(3) (1842) 10 Cl. & F. 340.

(4) (1915) L. R. 42 I. A. 163.

(5) (1918) L. R. 45 I. A. 94.

for it was merely signed by persons who professed to be witnesses to its execution, although in truth and in fact they were not so.

Their Lordships are, therefore, of opinion that, as against the appellant Musammat Hira Bibi, the mortgage decrees of both the Courts below should be set aside with costs, and the suit dismissed as against her. With regard to the other appellants the decrees should stand.

The costs of Musammat Hira Bibi should be paid by the contesting respondents, but the other, and unsuccessful appellants, should pay the costs of such of the respondents who appeared. Their Lordships will humbly advise His Majesty accordingly.

W. W. Box & Co : Solicitors for Appellants.

Watkins & Hunter : Solicitors for Respondents.

A. de M.

Appeal allowed as regards Hira Bibi but dismissed as regards others.

FULL BENCH.

Before Sir Hugh Walmsley, Knight, Judge, Sir Ewart Greaves, Knight, Judge, Mr. Justice C. C. Ghose, Mr. Justice B. B. Ghose and Mr. Justice M. N. Mukerji.

NAWABZADI MEHER BANO KHANUM AND OTHERS

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.

Assessment—Income Tax act (XI of 1922), Secs 2(1) (a), 4(3) (viii)—Mutation Nasar.

Per Curiam (Walmsley, J. dissentiente) : Mutation *Nasar*, that is, the amount paid to a landlord for recognising the transfer of a holding situated within a permanently settled estate, and subject to payment of roadcess by a tenant to another is rent or revenue derived from land within the meaning of section 2 sub-section (1) (a) of the Indian Income Tax Act and as such is exempt from assessment to income tax under section 4 subsection 3 (viii) of the said Act : *Birendra v. Secretary of State (1)* over-ruled on the point,

*Full Bench Reference No. 1 of 1925, is Reference No. 5 of 1924, made by Commissioner of Income Tax of the Dacca Range.

(1) (1920) I. L. R. 48 Cal. 766 ; 32 C. L. J. 433.

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January, 27.

Reference under section 66(2) of the Indian Income Tax Act.

The facts of the case appear from the judgment.

The Reference came on for hearing before Mr. Justice Greaves and Mr. Justice Mukerji who delivered the following judgments :

Greaves, J. : This is a Reference under section 66 (2) of the Income Tax Act, Act XI of 1922, made to us by the Commissioner of Income-tax. The point which arises is a very short one, namely, whether Mutation Nazar, that is, the amount paid to a landlord for recognising the transfer of a holding by one tenant to another, is agricultural income within the meaning of section 2, sub-section (1) (a) of the Indian Income-tax Act, XI of 1922 and as such is exempt from assessment to income-tax under section 4, sub-section 3 (viii) of the said Act. The Income-tax officer held that such payments were assessable to income-tax having regard to the decision of this Court in the case of *Maharajah Birendra Kishore Manikya Bahadur v. Secretary of State for India in Council*, (1) An appeal was preferred by the assessee against the assessment of the Income-tax officer. The Assistant Commissioner of the Dacca Range rejected the appeal agreeing with the decision of the Income-tax officer. Accordingly, an application was made to the Commissioner of Income-tax asking for a Reference to this Court under the provisions of the section of the Act to which I have referred and the Commissioner has, accordingly, referred the question in the terms which I have indicated. He agrees with the Income-tax officer that the assessment was rightly made and that the *Nazar* is not agricultural income and is, therefore, not exempt from income-tax and he adopts as the grounds of his decision the reasoning of this Court in the case of *Birendra v. Secretary of State* (1) to which I have just referred. The case of *Birendra v. Secretary of State* (1) was decided under the Income-tax Act of 1918 but it is conceded that so far as the question now before us is concerned that Act was identical with the present Act of 1922. The point, therefore, is covered by the decision in *Birendra v. Secretary of State* (1) provided we agree with that decision. Before I refer to it I must refer shortly to the sections of the Income-tax Act of 1922 which bear upon the point. Section 4, sub-section (3) provides that the Act is not to apply to certain classes of income. Amongst these, is the agricultural income and in section 2 of the Act agricultural income is defined as rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or

(1) (1920) I. L. R. 48 Cal. 766 ; 32 C. L. J. 433.

subject to a local rate assessed and collected by officers of Government as such. The land in respect of which the Nazar was paid was a part of a permanent-settled estate which is also subject to road cess.

Two points arose for decision in the Reference to which the case of *Birendra v. Secretary of State* (1) relates. The first point was whether the Nazar or Selami payable in respect of a tenancy of waste land was assessable to income-tax or exempt as being rent or revenue derived from land used for agricultural purposes within section 2, sub-section (1) (a) of that Act. The second question was the one which directly arises on the present Reference, namely, whether the Nazar or Selami paid for the recognition of the transfer of a holding from one tenant to another was rent or revenue derived from land which was used for agricultural purposes within the meaning of section 2, sub-section (1) (a) of the then Income-tax Act. The learned Judges who heard the Reference decided that Nazar or Selami paid in respect of waste land was revenue within the meaning of section 2, sub-section (1) (a). The reason for their so holding was that they thought that the amount fixed for periodical payment, that is, rent, was not independent of the Nazar or Selami and that the Nazar or Selami was a capitalised sum which taken with the periodical rent constitute in the aggregate the consideration for the grant. When, however, they came to consider the question of Nazar or Selami paid for recognition of the transfer they held that this was not revenue within the meaning of section 2 (1) (a) because it was not a return, yield or profit of any land and further that it was not rent in any sense of the term but they held that such a payment was a payment to purchase peace in order that the landlord might not contest the validity of the transfer and they held that this was not a payment that came within the scope of the definition of agricultural income. With all respect to their Lordships who decided that case I feel some difficulty in accepting the reasoning upon which it is founded. The expression "revenue" as they say in their judgment includes return, yield or profit of any land and I find it very difficult to escape from the conclusion that a payment of this kind is not profit derived from the ownership of the land. If, therefore, revenue includes profit, as I think it does, then it seems to me that Nazar or Selami is really derived from land which is used for agricultural purposes within the meaning of the expression as it occurs in section 2 (1) (a) of the Indian Income-tax Act of 1922.

The result is that, in my opinion, the assessee is exempt from

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payment of income-tax by reason of the provisions of section 4, sub-section (3) (viii) of the same Act. The question, therefore, which we refer for the decision of a Full Bench is whether the decision in *Birendra v. Secretary of State* (1) as regards *Selami* paid for the recognition of a transfer of a holding from one tenant to another is correct and the question which arises for the decision of the Full Bench is whether *Nazar* or *Selami* paid by a tenant to a landlord for the recognition of the transfer of a non-transferable holding is rent or revenue within the meaning of the expression as it occurs in section 2(1) (a) of the Indian Income-tax Act, XI of 1922. If the Full Bench hold that such *Nazar* or *Selami* is not assessable to income-tax, this judgment will be forwarded to the Commissioner. If, however, the Full Bench hold that the case of *Birendra v. Secretary of State* (1) was rightly decided, the matter will come back to this Bench in order that we may deal with the other question which was raised before us by the assessee, namely, that having regard to the provisions of the Permanent Settlement no liability for assessment has been imposed by the Income-tax Act on *Nazar* or *Selami*.

Mukerji J : I agree.

Mr. Jogendra Nath Mukherji and *Babu Parash Nath Mukherji* for the Petitioner.

Mr. B. L. Mitter (Standing Counsel), *Babu Surendra Nath Guha* and *Moulvi Nuruddin Ahmed* for the Government.

C. A. V.

July, 22.

Walmsley, J : This Reference raises the question of the liability of mutation *Nazarana* to income tax.

The referring Judges are unable to agree with the view taken in the case of *Birendra Kishore Manikya v. Secretary of State for India* (1). In that case it was held that the premium paid for the settlement of waste land or abandoned holdings is not liable, but that the premium paid for recognition of a transfer of a non-transferable occupancy holding from one tenant to another is liable.

I was one of the three judges who delivered that decision, and I find that I am in a minority on this Bench. In the absence of any fresh arguments it is enough for me to say that I adhere to the opinion expressed in that judgment for the reasons there given.

Greaves J : The question which arises for the decision of the Full Bench is, whether *Nazar* or *Selami* paid by a tenant to a landlord for the recognition of the transfer of a non-transferable holding is rent or revenue within the meaning of the expression as

(1) (1920) L. L. R. 48 Calc. 766 ; 32 C. L. J. 433.

it occurs in section 2 (1) (a) of the Indian Income Tax Act (Act XI of 1922). This question arose for the decision of the Court in the case of *Maharajah Birendra Kishore Manikya Bahadur v. Secretary of State for India in Council* (1) and it was there decided that such payments were assessable to income tax. Doubts having been raised as to the correctness of that decision the matter has been referred to the Full Bench. Agricultural income is not assessable to income tax under the Income Tax Act in which Act such income is defined as rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such and the land in the present case in respect of which *Nazar* was paid was a part of a permanently settled estate which is subject to road-cess. It is admitted by the learned Standing Counsel who appeared for the Secretary of State that *Nazar* is revenue but he argues that although it is revenue it is not revenue derived from land but from the transaction, that is from the recognition of the transfer, and that it is an incident of the transfer and not of the tenancy and therefore does not flow from the land.

In the case of *Birendra v. Secretary of State* (1) the learned Judge who delivered the judgment of the Court referred to the definition of revenue in the Oxford Dictionary as "the return, yield, or profit of any lands, property or other important source of income; that which comes in to one as a return from property or possessions, specially of an extensive kind; income from any source, but specially of an extensive kind; income from any source, but specially when large and not directly earned."

The conclusion seems to me irresistible that if it is admitted, as I think it is rightly admitted, that *nazar* is revenue, it is profit of the land and that it flows therefrom or from the ownership thereof but in *Birendra v. Secretary of State* (1) it is said that this is not so and that it cannot be deemed the return, yield, or profit of any land but that it is money paid by the transferee to the landlord to purchase peace, so that he may not contest the validity of the transfer.

This no doubt is true but it seems to me to ignore another aspect altogether namely that it is money which comes to the landlord by virtue of the fact that he is the owner of the land. Viewed in this light it clearly is derived from the land and is agricultural income within the definition thereof contained in the Income Tax

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Act and as such exempt from assessment to income tax under that Act.

I would therefore answer the question referred to the Full Bench by saying that *nazar* or *selami* paid by a tenant to a landlord for the recognition of a non-transferable holding is rent or revenue within the meaning of the expression as it occurs in section 2 (1) (a) of the Indian Income Tax Act (XI of 1922) and that it is exempt from assessment to income tax by virtue of the provisions of section 4 (3) (VIII) of the same Act.

It follows that in my view the decision in *Maharajah Birendra Kishore Manikya Bahadur v. Secretary of State for India in Council* (1) in so far as it holds to the contrary is not correct.

This judgment will be forwarded to the Commissioner of Income Tax.

C. C. Ghose, J : I agree with my learned brother Mr. Justice Greaves in the view which he has taken.

B. B. Ghose, J : I agree in the opinion expressed by my learned brother Mr. Justice Greaves.

Mukerji J : I also agree in the judgment delivered by my learned brother Mr. Justice Greaves.

A. T. M.

Reference accepted.

(1) (1920) I. L. R 48 Calc. 766 ; 32 C. L. J. 433.

PRIVY COUNCIL.

PRESENT.—*Lord Atkinson, Lord Shaw, and Lord Darling.*

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1925.

May, 8, 11, 22, 25.
June, 30.

MAUNG BYA AND ANOTHER

MAUNG KYI NYO AND OTHERS

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Nuisance—Artificial water course—Blocking of canal by lower land-owner—Consequent flooding and damage to owner of land higher up the canal—Liability of lower owner.

A raised road or "bund" traversed depressed ground, through which flowed a canal, properly provided with a gap or "eye" for the flow and a bridge over the

canal. The owner of land lower down the canal caused this gap or "eye" to be filled up, thus blocking up the course of the water in the canal at that spot, which water overflowed and flooded land higher up the canal course, and damaged the crops there:

Held, that the lower owner was guilty of an actionable nuisance, for which he was liable in damages to the higher owner: *Bickett v. Morris* (1); *Mensies v. Breadalbane* (2); *Orr Ewing v. Colquhoun* (3); *Nield v. N. & W. Ry. Co* (4); *King v. Commissioners for Pagham* (5); *Whaley v. L. Y. Ry. & Co.* (6); *Rylands v. Fletcher* (7) referred to.

It is immaterial in such cases to enquire how or by whom the waterway thus blocked up was originally formed or built, or whether it was a natural or an artificial watercourse.

Though, in the case of a natural watercourse, the various riparian owners are entitled, as an incident of their ownership, to the unimpeded flow of the water and to its reasonable enjoyments it passes in its natural course through the riparian lands, and, on the other hand, in the case of an artificial watercourse, such owners' right to the water-flow rests upon either prescription or grant from or on contract with the owner of the land from which the water was artificially brought, yet a watercourse, originally artificial, may have been made under such circumstances and used in such manner that a riparian owner may have over it, apart from grant or prescription or contract, the same rights as over a natural stream: *Rameshur Pershad v. Koonji B. Pattuck* (8); *Kensit v. G. E. Ry. Co.* (9); *Sutcliffe v. Booth* (10); *Holker v. Foritt* (11); *Baily v. Clark* (12) referred to.

The law in lower Burma as to the flow of, and flooding by fresh water rivers and watercourses, or trespasses on the bed or soil of such rivers, is the same as in England; *Abdul Hakim v. Gonesh Dutt* (13); *Ramasawmy Vaiker v. Rasi Naicker* (14) distinguished.

Appeal from a judgment of the Chief Court of Lower Burma (Maung Kin and Duckworth, JJ.) dated 31st May 1921, reversing the decree of the District Judge of Pyapon (PoBye, Esq.) dated 27th September 1919, awarding to the appellants Rs. 8821-48 cents, as damages, and costs against the respondents.

The material facts and arguments appear from the judgment of their Lordships.

G. Lawrence, K. C. and *Basley* for Appellants.

Harney, K. C. and *Leach* for Respondents.

The judgment of the Board was delivered by

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| (1) (1866) L. R. 1 H. L. 47. | (2) (1828) 3 Bligh N. S. 414. |
| (3) (1877) 2 App. Cas. 839. | (4) (1874) 10 Exch. 4. |
| (5) (1828) 8 B. & C. 355. | (6) (1884) 13 Q. B. D. 131. |
| (7) (1868) 3 H. L. 330. | (8) (1878) 4 App. Cas. 121. |
| (9) (1884) 27 Ch. D. 122. | (10) (1863) 32 L. J. Q. B. 136. |
| (11) (1873) L. R. 8 Exch. 107. | (12) (1902) 1 Ch. 649. |
| (13) (1885) 1 L. R. 12 Calc. 323. | (14) (1913) 1 L. R. 38 Mad. 149. |

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Lord Atkinson : This is an appeal from a judgment of the Chief Court of Lower Burma (Maung Kin and Duckworth JJ.) dated 31st May, 1921, allowing the appeal of the respondents against a decree of the District Court of Pyapon (Po Bye, District Judge) dated 27th September, 1919, by which the said District Judge ordered the respondents to pay the appellants the sum of Rs. 8,821-48 by way of damages and the costs of the suit.

The appellants in the second paragraph of their case allege that "the question raised is whether in Burma a lower agricultural owner is liable to compensate a higher agricultural owner for damage to crops by inundation caused by the blocking of a canal running through the lands of the lower owner by which the water would otherwise have been drained from the land of the higher owner."

In a sense, but only in a limited sense, is that statement accurate. Save in the second and third of the reasons for their appeal it is put forward that the law applicable in Lower Burma to the flow of and flooding by fresh-water rivers or watercourses, whether they be natural or artificial, or trespasses on the bed and soil of such rivers and streams, is different from the law as applied to similar subjects in England. A little consideration of the two cases cited, *Abdul Hakim v. Gonesh Dutt* (1) *Ramasawmy Nicker v. Rasi Naicker* (2), will show that there is no conflict between the two systems of law, and it was not contended in argument on the hearing of the appeal that the general principles of the laws of England touching the matters above mentioned did not apply to Lower Burma.

The action out of which the appeal has arisen was brought by the two appellants (who are husband and wife) in the District Court of Pyapon, Lower Burma, to recover damages amounting to Rs. 13,448 for the wrongful flooding by the acts and procurement of the respondents of a large tract of paddy lands 68.541 acres in extent, belonging to the appellants, whereby the productivity of these lands was, in the season in which the acts were done, so reduced that they only yielded 3,867 baskets of paddy instead of their normal yield of about 17,300. The District Judge decided in favour of the appellants and awarded them Rs. 8,821-48 damages. The Chief Court on appeal reversed the decree of the District Judge, and on grounds which appear to the Board strange, and are indeed unsound, decided in the respondents' favour.

Several maps of the locality were given in evidence; the two

(1) (1885) I. L. R. 12 Cal. 323.

(2) (1913) I. L. R. 39 Mad. 149.

most intelligible and useful were the first, a map marked exhibit A, and the second, dated in the year 1906—7, described as exhibit 2A. With almost perverted ingenuity the draftsman of these and, indeed, of many other maps, has omitted to place upon the face of them any indication of the points of the compass, so that in dealing with them one is obliged to use the words left and right, and top and bottom of the maps in order to endeavour to fix any point or object. A study of these two maps, however, enables one to get an idea of the terrain, especially as the map of 1906 represents what was the nature of the tract of country with which the case is conversant before any of the works were executed, the misuse of which is alleged to have caused the flooding, and as the second map, exhibit A, shows what were the features of that tract after these works had been executed. The map of 1906—7 purports to be a plan 126 of Sakangyi circle, Bogale township. It corresponded closely with the map Exhibit A.

Many rivulets or watercourses are depicted upon it. They correspond with those depicted upon exhibit A. The main difference between them is that on the latter a prolongation of the watercourse from Singu Chaung is to be found which is absent from 2A of 1906—7.

The watercourse, styled extravagantly the canal, represented on A, and lettered A, B, C, D, G, H, emptying into the sea creek at A is precisely the same watercourse as is represented on the map of 1906—7, coming from Singu Chaung and debouching into the same sea creek at the same place. No doubt the so-called canal is represented as being something broader than the corresponding stretch of watercourse on the map of 1906, but the fact of vital importance is that all the rivulets or watercourses are depicted as of the same width and kind, and resemble each other in all respects. There could be no object in depicting on this map a watercourse, as existing where none, in fact, existed when the map was made. The map therefore absolutely refutes the contention put forward with some hardihood on behalf of the respondents, that before the canal was made its site was a mere depression in the earth surface through which no stream ran; but in which, after heavy rain, stagnant water for a time accumulated. Now what was done in 1913—14 was, in their Lordships' view, the widening a little, and deepening a little, possibly trimming the banks a little, of an existing ancient fresh-water natural watercourse, not in their view the making by excavation and such work of a watercourse, styled a canal, where none such theretofore existed.

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The lands of the first respondent lie to the left-hand side of the map, between the lands of the appellant and the sea creek Kyonkan Chaung. On the map exhibit A they are numbered 17, 18, 30, 31, 32. The other respondents are merely cultivators in the village of Kamakalu. The lands of the appellants are comprised in three kwins lying to the right of the first respondent's lands and named respectively Kasung Ngotto (both marked on exhibit A), and Sakangyi South and Casaung Ngotto (both marked on map B). They are numbered separately 1—14 on map marked B. In addition to the refutation of the respondents' suggestion as to there never having been formerly a rivulet or watercourse where the canal exists now, one finds that several witnesses depose to there having been a small Yo where the bridge was afterwards erected, that a jungle log was placed across the Yo before the bridge was built, which certainly suggests to their Lordships that this log was designed to fulfil the function of stepping stones to enable people to cross the stream, possibly dry-shodded and in safety.

In the present case the early history of this *locus in quo*, this large tract of paddy land intersected with rivulets of water, large or small, is very vague. The evidence as to what were the rights and obligations which the inhabitants owed to each other in reference to these watercourses, the local law as to their regulation, their enjoyment and protection, is so confused and contradictory that it has occurred to the Board that it would possibly be better to reverse the usual order of procedure and, before dealing with the evidence of the witnesses, the facts proved, and the rulings of the Judges, to demonstrate, by reference to four or five well-known English cases, what the well-established law is touching the flow of and flooding by rivers and watercourses, the diminution of their currents or the diversion of their course, the trespass upon their beds, the incursion of the sea upon one's land, and the measures the owner may take to protect himself, and then by applying a coherent and consistent body of principles to the facts proved, thus endeavouring to solve in harmony with English law the issues raised, considering any local law which may modify the English law.

The first of these cases is *Bickett v. Morris* (1). It deals with trespass on the alveus or bed of a fresh water watercourse.

The appellant obtained, in consideration of £10 paid by him, permission from a riparian owner on the river Kilmarnock, in Ayrshire, to extend a certain wall then standing on the respondents'

(1) (1866) L. R. 1 H. L. 67.

premises on to the alveus of the river as far as was indicated by a red line drawn on an identified ordnance map. The appellant proceeded to build the wall, but, as the respondents alleged, not in the direction indicated. The respondents accordingly applied for an interdict against him, and brought an action for a declaration that the appellant had no right to erect buildings on the solum of the river beyond the red line aforesaid. Lord Cranworth, in delivering judgment, dealt at length with the legal points raised in the discussion. At page 58 of the report he said :—

“By the law of Scotland, as by the law of England, when the lands of two conterminous proprietors are separated from each other by a running stream of water, each proprietor is *prima facie* owner of the soil of the alveus or bed of the river *ad medium filum aquæ*. The soil of the alveus is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that if from any cause the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the alveus, each of them, up to what was the *medium filum aquæ*, in the same way as they were entitled to the adjoining land. The appellant contended that as a consequence of this right every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the alveus so long as other proprietors cannot show that damage is thereby occasioned or likely to be occasioned to them. I do not think that is a true exposition of the law.”

Lord Cranworth then dealt with the difficulty, almost the impossibility, of determining in anticipation what damage may result in flood time by the erection of buildings on the alveus of a stream and speaking of the riparian proprietors, put their case succinctly in these words.

“They are entitled to say ‘We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it.’ This is a plain, intelligible rule, easily understood and easily followed, and from which I think your Lordships ought not to allow any departure.”

Lord Westbury, at page 61 of the report, thus expresses himself :—

“When, however, it is said that proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium filum*, it does not by any means follow that that property is capable of being used in the ordinary way, in which so much land uncovered with water might be used ; but it must

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be used in such a manner as not to affect the interest of riparian proprietors of the stream. Now the interest of a riparian proprietor in the stream is not only to the extent of preventing it being diverted or diminished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor."

So much as to interference with the alveus which is stated in the head note of this case to be *sacred*.

In *Menzies v. Breadalbane (Earl of)* (1) it was held that a proprietor on the bank of a river, having commenced the building of a mound, which, according to the opinion and report of an engineer, would if completed, in times of ordinary flood throw the waters of the river on to the grounds of a proprietor on the opposite bank so as to overflow and injure them, should be restrained by perpetual interdict from the further erection of any bulwark or other work which might have the effect of diverting the stream of the river in time of floods, *i.e.*, ordinary flood, from its accustomed course and throwing the same upon the lands of the appellant. Lord Eldon, in delivering the judgment of the House (at page 418) said :—

"It is unnecessary to trouble your Lordships with any observations on the law of England . . . because it is clear beyond a possibility of doubt that by the law of England such an operation" (*i.e.*, as that complained of) "could not be carried on . . ."

At p. 419 he then said :—

"But let us see what is said on this subject by the institutional writers on the law of Scotland,"

He then quotes with approval the following passage from Erskine's Institutes :

"When a river threatens an alteration of the present channel by which damage may arise to the proprietor of the adjacent or opposite ground it is lawful for him to build a bulwark *ripae muniendae causa* to prevent the loss of ground that is threatened by that encroachment,"

Lord Eldon then proceeds :—

"so that the proprietor whose lands are threatened to be washed away may, for the purpose of protecting his own property in a case of that description, raise a bank for his own security ; but this bulwark must be so executed as to prejudice neither the navigation nor the grounds on the opposite of the river."

(1) (1828) 3 Bligh. N. S. 414.

This right of navigation, however, is not a right of property. It is simply a right of way which must not be interfered with : *Orr Ewing v. Colquhoun* (1).

In *Nield v. The London and North-Western Railway Company* (2), the defendants owned a canal which was threatened with an overflow into it of flood water from a neighbouring river, and, fearing damages to their premises situated on the banks of the canal, placed across the canal some planks rising up higher than the level of the water in the canal, which, being obstructed when the flood increased, rose till it flooded the plaintiff's premises. In an action brought by the plaintiff to recover damages for this injury, it was held that the defendants were not liable on the ground that they had not brought on to the plaintiff's premises the water which did the injury, and that there was no duty on the owners of a canal analogous to that resting on the owners of a natural watercourse not to impede the flow of the water down it.

So much as regards fresh water streams. As regards the right of an owner of land whose land is exposed to the inroads of the sea, the case of *The King v. The Commissioners of Sewers for Pagham* (3), many times approved of, is a distinct authority. In delivering his judgment that most able and learned Judge, Bayley J., stated the rule of law in these words :—

" Every land owner exposed to an inroad of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose, and the Commissioners (*i.e.*, the defendants) may erect such defences as are necessary for the land entrusted to their superintendence. If, indeed, they make unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention to injure the owner of other lands, they would be amenable to punishment by criminal information or indictment for an abuse of the powers vested in them. But if they act *bona fide*, doing no more than they honestly think necessary for the protection of the level (*i.e.*, the land they superintend) their acts are justifiable, and those who sustain damage therefrom must protect themselves."

The last English case necessary to refer to on this subject is that of *Whaley v. The Lancashire and Yorkshire Railway Company* (4). It is somewhat peculiar in its features. The defendants were proprietors of a railway which ran along from east to west

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(1) (1877) 2 App. Cas. 839 (846).

(2) (1874) L. R. 10 Ex. 4.

(3) (1828) 8 B. & C. 355.

(4) (1884) 13 Q. B. D. 131.

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over a flat country on a low embankment. A ditch ran along on each side of this embankment for the purpose of draining the railway. The surrounding land sloped from south-east to north-west, so that the land on the north-west side of the railway embankment, where the damage occurred, was at a lower level than on the south-east side of the embankment. The plaintiff was a farmer occupying lands on the north-west side, the lower side of the railway, but separated from it by other lands belonging to other persons. By reason of an unprecedented rainfall a quantity of water which accumulated on the south-eastern side of the embankment, was dammed up against it, and ultimately rose to such a height as to expose the embankment to danger. This water, it was apparently considered, might possibly have percolated through the embankment, and in no sense did the Company, as did the defendant in *Ryland v. Fletcher* (1), bring the water upon or up to the Company's lands, but when the water had risen to such a height that the defendants thought it was necessary for the protection of their embankment, they caused trenches to be cut in the embankment, through which the water was enabled to escape to the north-west side of the railway and from thence to flow into the adjoining lands and ultimately to the plaintiff's land, damaging his crops. The case was tried before Mr. Justice Day and a jury. The jury found that the cutting of the trenches through which the water flowed was reasonably necessary for the protection of the defendants' property, that it was not done negligently, and that the plaintiff was injured by the water that so came through the trenches to the extent of £138 beyond what it would have been if the trenches had not been cut. On these findings the learned Judge gave judgment for the plaintiff for £130. Brett, M. R., deals in his judgment with the facts of the case and the principles applicable to it. At page 137 he said :—

“ But then it is suggested that if a person has brought the danger on his land, it makes a difference. So it does. If he has not brought the danger there, and without any act of his it breaks through his land on to his neighbour's land, I take it he is not liable. In that case both have suffered from a common extraordinary danger, but one has suffered before the other ; that is all.....

. . In this case the water endangered the embankment and, moreover, it would have gone on to the plaintiff's land in any event ; but then if it had been left alone and allowed simply to percolate through the embankment, even though all of it would have gone on

(1) (1868) L. R. 3 H. L. 336.

the plaintiff's land, it would have gone without doing the injury which was done by reason of its pushing through the cuttings which the defendants made. The defendants did something for the preservation of their own property which transferred the misfortune from their land to that of the plaintiff, and therefore it seems to me that they are liable."

Lord Justice Lindley, at page 140 of the report, says :

"it appears to me that this case is more analogous to the Scotch case of *Menzies v. Earl of Breadalbane* (1) and *Nield v. L. N. W. R. Company* (2).

"It seems to me established by those cases that if an extraordinary flood is seen to be coming upon land the owner of such land may fence off and protect his land from it, and so turn it away without being responsible for the consequences, although his neighbours may be injured by it."

"*Rex v. Pagham Commissioners* (3), is another step in the same direction....We must look at the broad question, which is whether a land owner on whose land there is a sudden accumulation of water, brought there without any fault or act of his, is at liberty actively to let it off on the land of his neighbour without making that neighbour any compensation for damages, because the landowner by doing so has been able to save his own property from injury? I can see no authority for that, and it appears to me the general rights and duties of landowners are decidedly against it."

Some point was made in this case to the effect that the stream alleged to have been stopped up was at best merely an artificial watercourse and not a natural one. In the latter case the successive riparian owners have been each entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land as a natural incident of the ownership of his land. In the former case, however, any right of the owner to the flow of the water must rest on prescription or grant from or contract with the owner of the land from which the water is artificially brought : *Rameshwar Pershad Narain Singh v Koonji Behari Pattuk* (4) ; *Kensit v. Great Eastern Railway Company* (5).

There is, however, a well-established principle of law directly bearing upon this case and vitally affecting it, namely, that a watercourse originally artificial may have been made under such circumstances, and have been used in such a way that an owner of land

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(1) (1828) 3 Bligh N. S. 414.

(3) (1828) 8 B. & C. 355.

(5) (1884) 27 Ch. D. 122 (134).

(2) (1874) 10 Ex. 4.

(4) (1878) 4 App. Cas. 121.

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situate on its bank will have all the rights over it that a riparian owner would have if it had been a natural stream : *Sutcliffe v. Booth* (1) ; *Holker v. Poritt* (2) ; *Baily & Co. v. Clark, Son and Morland* (3).

It is not necessary in order to apply the principles of these decisions to analyse the evidence in detail. It was proved by a Public Officer, the Superintendent of Land Records, and not contradicted, that this so-called canal went right up to the boundary of the appellants' land ; while on the following five paragraphs of the written statement of the respondents they practically admitted the facts founding the charge against them, though at the same time they misrepresent the conduct and action of the appellants. These paragraphs run thus :—

6. The said channel became wider and longer through erosion, with the result that the salt water from Kyonkan Chaung overflowed on the lands of this defendant and of adjoining cultivators and caused damage thereto.

7. In order to prevent such damage in or before the year 1914 the first defendant admits there was a bund erected across the said channel at a point where it flows through the land of this defendant and others. Such erection was said to be by the permission of Maung Thi Hla, the then Township Officer of Bogale.

8. The said bund gave away in or about the year 1916-17, and this defendant with his assistants repaired the bund formerly erected at the same place where the original bund was erected without any objection on the part of the plaintiffs or any one else.

9. On the 1st July, 1917, the first plaintiff and others illegally trespassed on the first defendant's lands originally acquired and lands purchased afterwards and opened the said bund, but the bund was erected again as there was no legal order and report that effect was made to Thugyi Maung Shwe Loon.

10. On or about the 25th August, 1917, in pursuance of an order of the Deputy Commissioner of Pyapon, the said bund was opened, and after such date it has not been closed.

The evidence and findings of the Judges upon these statements establish, as will presently be shown, that the defendants themselves erected the bund referred to in the second as well as in the third of these paragraphs. To effect this work they must have gone in upon the alveus of the canal, closed up with this bund, the eye of the bridge what was the outfall of the

(1) (1863) 32 L. J. Q. B. 136.

(2) (1873) L. R. 8 Ex. 107.

(3) (1902) 1 Ch. 649 (664, 669, 673).

canal into the sea, and thus have offended against the law as laid down in the English cases. The District Judge framed for himself certain issues and answered them thus: To the second issue he gave the answer that the canal was not a Government constructed work, but was for a long time before 1906-1907 a naturally-formed channel. The third issue so framed ran, "Did this canal facilitate the free outflow of rain water from the plaintiffs' (appellants') paddy lands?" His answer ran thus: "There cannot be any doubt that as all the parties admitted the canal takes the water into the Kwin from the Kyonkan Creek at flood tide, and takes the water out from the Kwin into the creek at ebb tide, therefore a certain extent of rain water must find its way into the Kyonkan Creek as a natural consequence." And, again, "there cannot be any doubt as to the motive of the defendants that they erected the bund and closed the canal to protect their own fields from salt water; but there cannot also be any doubt that the stoppage of the outflow at ebb tide caused the excess water to remain in the fields of both the parties." He answers the fifth issue in the following words: the "weight of evidence is clearly in favour of the plaintiffs," and I would [thus] answer the fifth issue.

He further finds that Map 2A makes it clear that the channel had been in existence before the year 1906-1907, and that there was no canal construction by any one. He ultimately gave a decree in favour of the appellants for Rs. 8,821-48. No case has been made that these damages were excessive in amount if the legal wrong complained of had been actually committed. There was ample evidence in the case to sustain the findings of the District Judge if he believed the witnesses who gave it, as apparently he did, having seen and heard them. It appears to their Lordships plain that the access of some salt water from the creek through the eye of the bridge into the canal twice in the twenty-four hours in flood tide does not resemble in any way those incursions of the sea dealt with in *The King v. The Commissioners of Sewers for Paghani* (1), and still less did the closing up of the eye of the bridge, by this bund, and in seasons of heavy rain the ponding up of the fresh water in the canal, so that lands higher up the stream were flooded resemble those necessary precautions which a landowner whose land is at the mercy of these incursions of the sea is entitled to take to protect his property. If the stopping up of the outfall of the canal was justifiable by reason of this access of some salt water

(1) (1828) 8 B. and C. 355.

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at flood then every freshwater tributary to a tidal river could be closed up at its mouth to prevent the like consequences.

Both the cases *Abdul v. Gonesh Dutt* (1) and *Ramasawmy v. Rasi* (2) referred to in the third reason for the appellants' appeal deal with surface water, the rain which falls on agricultural land not with watercourses of any kind. They are irrelevant therefore to the questions in controversy in this case, and are not in conflict, it appears to their Lordships, with any of the English cases cited.

The respondents appealed, and on the appeal the learned Judges of the Chief Court of Appeal seem to have taken a course as unwise as it was extraordinary. The appellants had undoubtedly in paragraph 4 of their plaint stated that the Government had in the year 1913 dug this canal, shown by letters A, B, C, D. on Exhibit "A." That was no doubt found to be untrue, but no evidence whatever was given to show that the Government had any jurisdiction or authority to do such a thing, and what is much more important that if they had such authority an action could not be brought for any injurious consequence resulting to individuals from its execution.

That paragraph of the plaint is followed by two others, Nos 5 and 9.

5. The said canal thus facilitated the free outflow of the rain water from the plaintiff's paddy lands aforesaid into the said Kyonkan Chaung and rendered cultivable all the lands situate in Kasaung Ngotto West Kwin and Sakangyi South (A) and (B) Kwins, which adjoin the said Kamakalu Kwin.

9. The plaintiffs have been informed and verily believe that during the month of Kason or Nayon, 1279 B. E. the first defendant's tenants and servants by order of the first defendant and the defendants Nos. 2 to 8 closed the said canal at the point B shown in red ink in the plan Exhibit A.

The alleged wrong for which the plaintiffs claim damages was the stopping up by a bund of the outfall of the canal, by which means the water of the canal, having been denied escape at the proper place, was ponded up, flowed back, and flooded their lands. The identity of the body or person which or who actually formed the canal was a matter wholly irrelevant to the matters in issue. It did not form even an ingredient in the cause of action, and there is not an averment in the plaint to show that the plaintiffs did not rely upon the canal being an old natural watercourse

(1) (1885) I. L. R. 12 Calc. 323.

(2) (1913) I. L. R. 38 Mad. 149.

enlarged, but new or artificial. The plaint is entirely consistent with their relying upon the one thing or the other, as suited them best.

Yet, strange to say, one of the learned Judges in the Chief Court (Mr. Justice Duckworth) considered that this statement as to the digging of the canal by the Government was a matter of such vital importance, that the judgment of the District Judge should be reversed, and his decision in the plaintiffs' favour be overruled because this allegation had not been proved.

In justice to Mr. Justice Duckworth, the following passages from his judgment should be quoted :—

"I have only to add a few remarks. It appears to me that the plaintiff-respondent Maung Bya set up a certain case in his pleadings, by which he must either stand or fall. It is clear, from his plaint, that his case was that, until Government made a canal, the lands which belong to him were unworkable, but that, after Government made a canal connecting the Fishery creeks with the Kyonkan Chaung, his fields became culturable. Further, he contended that owing to the appellant Maung Tet closing this canal, at the Kyonkan Chaung end, by a bund, in 1917 he suffered certain damage through his fields becoming inundated."

It does not appear to their Lordships that this is at all an accurate or fair construction of the plaint of the appellants.

The learned Judge then proceeds :—

"In fact, treating this channel, as I think we must, as a natural watercourse [see *Kaw La v. Maung Ke* (1)], we find that appellant is a riparian proprietor, whereas the respondent is not.

"This is the only view of the case which can be inferred from the evidence."

"This would go to show that the map of 1906 was right, and that what was done in 1913 was to clean up flooded areas and deepen a natural watercourse, and not to create a new one, involving the forfeiture of the riparian owners' rights.

The last paragraph, the different portions of which seem scarcely consistent with each other, runs thus :—

"It is quite unnecessary to consider any other points. The respondent set up a case, which he failed to prove, and obtained a decree before the District Court on a case which he had not pleaded. It is settled law that a plaintiff must not be permitted to succeed on a case which he has not put forward directly or indirectly in his plaint. Further, it is apparent that the learned Judge

(1) 8 L. B. R. 556.

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of the District Court took a mistaken view of the facts, his chief error being his overlooking the fact that respondents' lands drew no advantage whatever from this channel until it had opened a way through the road bund into the Kyongkan Chaung, and that only some four years prior to any cause of action having arisen.

"I concur with my learned brother in allowing the appeal with costs, and in the decree passed by him, including special costs to Messrs. Leach and Lentaigne Junior."

The passage appears to suggest that a defendant who diverts or stops the flow of a natural watercourse and thereby floods the lands of a riparian owner is not to be held responsible in damages for the wrong unless he, the defendant, has made a profit by it. In their Lordships' opinion such a doctrine is unsound.

The other learned Judge, Mr. Justice Maung Kin, deals with this point somewhat differently. He says :—

"The finding that the canal was not one made by the Government is not contested before us. It is, however, contended that plaintiff had the right to the undisturbed flow of water from his land through the canal into the Kyonkan Chaung on the ground that the canal is a natural waterway.

"It is doubtful whether the learned District Judge was right in giving a decree upon a case not set up by plaintiff in his plaint. The basis of the suit as described in the plaint is that the canal was dug by the Government for the benefit of the cultivator, and that it, in fact, benefited them, because it drained the surplus rain water from plaintiff's land."

This, as has been already pointed out, is not a true construction of the appellants, case and contention.

The learned Judge then proceeds to add :—

"I may add that there is no equity in favour of plaintiff. He had not derived any benefit before the depression became sufficiently wide and deep to allow of its carrying water coming from the direction of his land, and when the bund was built by Government, there was no reason for thinking that that water would flow in the direction of the bund. But the defendants have all along enjoyed the benefit of the existence of the bund, because it has prevented blackish water coming to defendants' lands from the Kyonkan Chaung. I do not see any justice in allowing plaintiff's claim to remove the bund for the benefit of his land, unless he has a natural or prescriptive right to make it. I have held that he has no natu-

ral right, and sufficient time has not elapsed for a prescriptive right to ripen.

"For the above reasons I would allow the appeals Nos. 183 and 188 of 1919, with costs."

It appears to their Lordships difficult to understand what he learned Judge meant by the first of these paragraphs.

Their Lordships are quite unable to concur with the learned Judges of the Chief Court in the views they have taken of the rights and liabilities of the parties litigant in this case. They think these views are conflicting *inter se*, unsound and misleading. To gather together the points fully dealt with above it may be said that in their Lordships' view it is clearly established (I) that a raised road or *bund* ran transversely across the depressed ground through which flowed the channel of water, and was properly provided with a gap for the flow and a bridge over the channel, (II) that the *bund* thus provided with an eye and a bridge to permit the inflow and outflow of water was interfered with by the respondent who filled up the eye and channel course thereat and converted an innocuous *bund* into a dam, which dammed back the water on to the appellant's land, and that in law (III) the respondents are responsible for the damage thus caused to the appellant's property. They think the judgment appealed from was erroneous and ought to be set aside, that the decision of the District Judge was right and should be restored, and will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellants in the hearing of the Chief Court and of this appeal.

Light & Fulton : Solicitors for Appellants.

H. Hilberry & Son : Solicitors for Respondents.

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Appeal allowed.

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APPELLATE CIVIL.

Before Mr. Justice Suhrawardy, and Mr. Justice Cuming.

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v.

HEM CHANDRA CHAKRAVARTY AND OTHERS.*

Contract—Zemindar's right to enhance rent—Express words, if necessary, to fix the rent in perpetuity—Acting of parties—Construing one contract by another.

The zemindar holding under the Permanent Settlement, has a right from time to time to raise the rent of all rent paying lands within his zemindary according to the current rate unless he is precluded from the exercise of that right by a contract binding on him or by the law in force : *Bamasoondery v. Radhika* (1) and *Nirod v. Harihar* (2).

No express word is needed in a document evidencing a contract to fix the rent in perpetuity.

The lease being found ambiguous in the present case, the rule how the parties understood it, is applied.

It is not proper that a contract in one case should be interpreted in the view taken with regard to another contract which is differently worded and under consideration in another case.

Appeal by the plaintiffs.

Suit for enhancement of rent.

The material facts appear from the judgment.

Babus Jogesh Chandra Roy and *Asitaranjan Ghose* for the Appellants.

Mr. Gunada Charan Sen and *Babu Probodh Chandra Kar* for Defendant No. 1 Respondent.

Dr. Sarat Chandra Basak and *Babu Sajani Kanta Nag* for Defendant No. 2 Respondent.

The judgments of the Court were as follows :

Suhrawardy J : The main and substantial ground on which this appeal has been pressed is that the finding of the lower appellate

*Appeal from Appellate Decree No. 1330 of 1922, against the decree of Babu Jatindra Chandra Lahiri, Subordinate Judge, 2nd Court, of Backargung, dated the 1st March, 1922, reversing that of Babu Protap Chandra Sen Gupta, Munsiff 2nd Court, at Bhola, dated the 28th September, 1920.

(1) (1869) 13 M. L. A. 248 ; 13 W. R. P. C. 11 ; 4 B. L. R. P. C. 8.

(2) (1920) 32 C. L. J. 19.

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Court that the *pottah* in suit created a tenure the rent of which was not liable to enhancement is not correct. The tenure it appears was created by the *pottah* dated the 30th December 1885. It was a *nimhowla pottah* granted by Rajlakshi Debya (who was the Howladar) to the predecessor of the defendants. It begins with the following words: "There was my husband's permission to grant to you Nimhowladari *pottah* in respect of the entire lands and Jamas comprised in the said *howla* at a profit or Rs. 75." Then follow some words which it is not material to quote and then it proceeds to run as follows: "I grant to you a *nimhowladari pottah* in respect of the entire lands and Jamas of the said *howla*. You shall without objection pay into my office Rs. 102. 7. 6 being the rent for the *howla* and Rs. 75 being the amount of my profits—the total amount being Company's Rs. 177. 7. 6 year by year and month by month according to the *kists* mentioned below" This is followed by the usual recitals in a document of this description with regard to the mode of possession and other matters. The last clause is in the following words: "When survey and *Jamabandi* are made in respect of (the lands or) the other howladars and *nimhowladars* of the said *tappa*, the *nimhowla* will be measured and you will get reduction of proportionate area (*Jigba Rakba*) according to the practice in respect of the other *nimhowladars* and upon *bundbast* (settlement) according to the rates paid for other *nimhowlas*. If the rent is greater you will pay the same into my office, and if it is less you will get reduction." The learned Subordinate Judge in the Court of appeal below construing this document with certain other documents executed since its creation has come to the conclusion that the tenure created by this *pottah* was one at a fixed rent and consequently dismissed the plaintiff's suit.

• It is argued before us by the learned vakil for the appellant that this *pottah* should be read as not interfering with the general right which a zemindar possesses of enhancing the rent of his subordinate tenure-holders. The proposition of law that the zemindar holding under the Permanent Settlement has a right from time to time to raise the rent of all rent paying lands within his zemindary according to the current rate unless he is precluded from the exercise of that right by a contract binding on him or by the law in force is unquestionably correct. See the cases of *Bamasoondery Dassiah v. Radhika Chowdhraïn* (1), and *Raja Nirod Chandra Singha Sarma v. Harihar Chakravarti Chowdhury and others* (2). That being so, the only question that remains for consideration is

(1) (1869) 13 M. L. A. 248.

(2) (1920) 33 C. L. J. 19.

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whether the contract embodied in this pottah precludes the zemindar from exercising that general right which he has of enhancing the rent of the lands of his zemindary. The learned vakil for the appellant has strenuously argued that as there are no words in the contract curtailing or barring the right of the zemindar to enhance the rent of the lands within his zemindary, it must be held that the tenure created under the *pottah* was one the rent of which was liable to be enhanced. In fact the learned vakil has gone so far as to argue that unless any express words are to be found in a document evidencing a contract debarring the lessor from claiming enhancement of rent in future, it must be held that the tenancy is one of which the rent is liable to be enhanced; and in support of this view reliance has been placed upon the case of *Taruck Chunder Nundee and others v. Modhoo Soodun Nundee and others* (1). We do not think that the case carries us so far. In all the cases that have been placed before us attempts have been made to construe the particular contracts involved in them and it does not seem to be proper that a contract in one case should be interpreted in the view taken with regard to another contract which is differently worded and under consideration in another case. In the case of *Taruck Chunder Nundee and others v. Modhoo Soodun Nundee* (1) the learned Judges found that the pottah was a *mourasee* pottah but the rent fixed in the lease did not appear to have been fixed and invariable; and they remarked as follows: "There are not in it any such words as these: That the rent shall not hereafter be altered or increased". It is not laid down that these words are necessary in order to establish fixity of rent. In the case of *Ramdayal Giri v. Midnapur Zemindary Co. Ltd* (2), the learned Judges observed at Page 265 of the report as follows: "It is true there are in the lease no words which by themselves would bar an enhancement such as are used in formal leases in other parts of the country. But there is the consent of the parties" We therefore consider ourselves relieved from looking for any expression or word in the document fixing the rent in perpetuity.

We are next called upon to consider the general effect of the document. The learned advocates for the respondents have argued that the contract is plain enough and gives sufficient indication that what the parties intended was that it should be a *mourashi moharari* lease. The words no doubt lead to a conclusion very much akin

(1) (1866) 5 W. R. Act. X Rul. 80.

(2) (1910) 15 C. W. N. 263.

to what is contended for by the respondents. The *pottah* states that the lease was granted by the lessor and according to the wishes of her husband she reserved for herself a profit of Rs. 75 only. The last clause mentions the circumstance in which the rent can be varied so that it may be reduced or increased according as on the survey of the lands of the other *howlas* and *nimhowlas* the assets are found to be less or more than the present and fresh settlements made according to the rates paid for by other *nimhowladars*. This contingency has not arisen and it is not necessary therefore to consider what would have happened if it arose. But the fact remains that the term of the lease as to enhancement of rent is restricted to the one condition mentioned in it namely when the survey and *jamabandi* are made in respect of lands of other *howlas* and *nimhowlas* of the same *tuppa*. It is argued on behalf of the appellant that it cannot be maintained that because one circumstance is mentioned in which the rent can be varied it cannot be varied under any other circumstance; on the other hand the respondents contend on the doctrine of *Expressio unius est exclusio alterius* that by mention of one condition restricts the power of the landlord to vary the rent only to the happening of that event. We are unable to give effect to the contentions of either side on the mere construction of the *pottah* before us. We are therefore constrained to hold that the lease is not unambiguous in its terms and the interpretations which the parties attempt to put upon it are not without some force. The lease therefore being ambiguous in its terms, it is necessary to look as to how it was understood by the parties. The facts are that since its creation in 1855 there has been no variation of rent up to the present time i. e. for about 70 years and that the *nimhowla* in suit was described as a *mokarari jama* in the mortgage bond executed by the *nimhowladar* in favour of the plaintiffs themselves in 1898 as well as in the *kobala* executed by them in favour of a predecessor of the defendants in 1902. It is also in evidence that the plaintiffs themselves described the *nimhowla* in suit as a *mokaragi jama* in the plaint filed by them in the suit on the afore-said mortgage of 1898. These facts were considered by the lower appellate Court and it came to the conclusion that the lease was a *mourashi mokarari* lease. The finding thus arrived at by the lower appellate Court is in the nature of a finding of fact. We think that the conclusion arrived at by the Court of appeal below was correct and that the lease must be taken to be permanent in character with the rent fixed. In the view that we take of this

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question it is not necessary to consider the other question raised in the appeal with regard to the procedure adopted in fixing the enhanced rent or to the inapplicability of section 7 of the Bengal Tenancy Act to the facts of the present case, as was contended for by the respondents.

The result is that this appeal is dismissed with costs to the two sets of respondents.

Cuming J. : I agree.

A. T. M.

Appeal dismissed.

Before Mr. Justice Suhrawardy, and Mr. Justice Duggal.

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CHHAUNAT BIBI (*ALIAS*) CHHANNU BIBI AND OTHERS.*

Second appeal—Order setting aside execution sale after deposit of money—Civil Procedure Code (Act V of 1908), Sec 47, O. 21 R. 89, O 43 R. 1 (j).

No second appeal lies from an order passed in appeal from an order passed under order 21 rule 8, of the Code of Civil Procedure setting aside an execution sale after deposit of money, though the decree-holder was the execution purchaser: *Asimaddi v. Sundari* (1) followed. *Raghubar v. Yadu* (2) distinguished.

All orders between decree-holder and judgment-debtor under section 47 of the Code of Civil Procedure are not decrees and appealable as such.

Clause (a) of section 47 of the Code of Civil Procedure excludes an order which is an adjudication from which an appeal lies as an appeal from order under order 43 rule 1.

Appeal by the Decree-holder Auction-purchaser.

Application for setting aside an execution sale after deposit of money.

The material facts appear from the judgment.

*Appeal from Appellate Order No. 324 of 1923, against the order of G. N. Roy Esq., District Judge of 24-Perganas, dated the 28th May, 1923, affirming that of Babu Harijiban Banerji, Munsiff, 2nd Court, at Barasat, dated the 2nd January, 1923.

(1) (1911) 1 L.R. 38 Calc. 339. (2) (1911) 15 C. L. J. 89.

Mr. Hemendra Nath Sen and Babu Gopendra Nath Das for the Appellant.

Babu Dwijendra Krishna Dutt for the Respondents.

The judgment of the Court was as follows :

This is an appeal by the auction-purchaser in execution of a money decree. The respondents deposited the amount for which the property was sold and purchased by the appellant; but it was contended the money deposited was short by 12 annas. Both the Courts below have held that this was due to a *bona fide* mistake and set aside the sale. The second appeal is from the appellate order of the District Judge of 24 Parganahs.

A preliminary objection is taken by the respondents that no second appeal lies. We think that this contention should prevail. The order passed after the deposit made under order XXI rule 89 is an order under rule 92. An appeal lies from an order passed under that rule under order XLIII rule 1 (j) Code of Civil Procedure. But no second appeal lies from the order passed upon first appeal, under section 104 clause (2). It is argued by the learned advocate for the appellant that as the auction-purchaser was the decree-holder, the matter is covered by section 47; and under section 2 Civil Procedure Code the order passed under section 47 is a decree and is appealable. We think that this contention is not sound. Section 47 covers matters arising between parties to the suit relating to execution, discharge and satisfaction of the decree. An order passed under that section is a decree as defined in section 2 Civil Procedure Code. But clause (a) of that section excludes an order which is an adjudication from which an appeal lies as an appeal from order. All orders therefore between decree-holder and judgment-debtor under section 47 are not decrees and appealable as such. In the present case an appeal lies as an appeal from order under order XLIII rule 1(j). A second appeal therefore does not lie. We are fortified in our view by the decision in the case of *Asimaddi Sheikh v. Sundari Bibi* (1). The appellant has referred to the case of *Raghubar Dayal Sukul v. Jadu Nandan Misser* (2) which was however a case under the Bengal Tenancy Act. In this view we hold that a second appeal does not lie and this appeal is dismissed with costs two gold mohurs.

A. T. M.

Appeal dismissed.

(1) (1911) I. L. R. 38 Calc. 339.

(2) (1911) 15 C. L. J. 89.

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May, 19.

CRIMINAL REVISION.

*Before Sir Babington Bennett Newbould, Knight, Judge, Mr. Justice
Buckland and Mr. Justice B. B. Ghose.*

PROTAP CHANDRA GUHA ROY

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January, 20 21,

22, 23, 26.

February, 12.

March, 23.

V.

RASIDUDDIN KHAN.*

Defamation—Penal Code (Act XLV of 1860), Sec. 499 and Expl. II—Imputation concerning collection of persons—Police force—Offence of defamation, what constitutes—General expressions—Defamatory matter applying to class of individuals—Complaint under the orders of superior officer—Notes taken, if evidence—General words of abuse—Denial of charge—Personal conduct of collection of persons—Person defamed as member of a class, what to prove—Whether words defamatory or not, a question of fact—Words, how to be construed—Proof.

Per Buckland, J: The charges framed in the case did not conform to the requirements of section 499 of the Indian Penal Code.

Per Newbould, J: That the words set out in the first charge were defamatory.

Per B. B. Ghose J: A charge of defamation fails on the ground that it refers to the personal conduct only of a collection of persons as such.

Per Newbould and B. B. Ghose JJ: Though the whole police force at Char Manair were attacked by the petitioner, that was not sufficient to support a conviction on the second charge as framed.

Per Buckland J: As regards the second charge though no one was referred to by name or by reference to his office in the imputations charged, the nature of the imputations was indicative of the fact that an individual might be meant.

That the imputations in the charges were general expressions assuming that they concerned the complainant.

That the confusion of ideas which these charges disclosed made it impossible for a proper trial to be held.

Explanation 2 of section 499 Indian Penal Code includes a company or an association or collection of persons as such within the word "person" as used in the definition, so that the latter should not be limited to individuals.

In a case in which the Explanation is properly called into use the identity of the company or association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning

*Criminal Revision No. 887 of 1924, against the order of S. C. Mallik, Esq., Sessions Judge of Faridpur, dated the 25th September, 1924, modifying that of Babu A. R. Bose, Sub-Divisional Magistrate of Faridpur, dated the 21st July, 1924.

them as such with the intention of harming their reputation so that thereby they are defamed. An imputation concerning a company or association of persons as such, and the last two words of Explanation are most material to its correct application, cannot by virtue of this Explanation justify a charge of defaming an individual, and a charge cannot combine the Explanation with the definition for such a purpose.

The offence of defamation consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it: *E. Hulton and Co. v. Jones* (1), per Lord Loreburn L. C.

An individual is as much defamed by words apparently only of more general application as by words referring to him by name.

Where a defamatory matter appears only to apply to a class of individuals, if the description in such matters are capable of being, by *inuenendo*, shown to be directly applicable to any one individual of that class, an action may be maintained: *Le Fanu v. Malcolmson* (2).

Per B. B. Ghose, J.: If the complainant has been defamed, it is of no consequence that he complained under the orders of his superior officer in order to clear his character.

An accused in a prosecution under section 500 Indian Penal Code is entitled to prove the notes taken by him of the statements made by other persons regarding the subject matter as evidence of his good faith and they are relevant on the question, although the person who made the statements were not examined.

The words complained of as constituting defamation must be set out in the charge and proved before the accused can be convicted. When there is a denial, the evidence in support of the prosecution must be scrutinised.

The words "the British Government themselves and the superior officers including from the District Magistrate down to the Daroga and Chowkidars were all beasts etc." are too wide to admit of the construction that any particular police officer was defamed: *Eastwood v. Holmes* (3).

The words "collection of persons as such" in Explanation II of section 499 Indian Penal Code mean that a collection of persons as such may be collectively defamed in the same manner as a 'company'. The general principles on which a company may be said to have been defamed would therefore apply equally to the case where it is alleged that a "collection of persons as such" has been defamed.

If a person complains that he has been defamed as a member of a class must satisfy the Court that the imputation is against him personally and he is the person aimed at before he can maintain a prosecution for defamation.

The question whether the words are defamatory or not must be decided by the Judge as a question of fact, and in deciding this question the following principle should be taken into consideration: "All circumstances which were apparent to the bystanders at the time the words were uttered should be put in evidence so as to place the jury as much as possible in the position of such bystanders, and

(1) (1910) A. C. 20.

(2) (1848) 1 H. L. C. 637.

(3) (1858) 1 F. and F. 347

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then it is for the jury to say what meaning such words would fairly have conveyed to their minds."

A Judge should not construe the words as he would a document of title according to rules of construction of deeds, specially when the words spoken have not been proved with certainty, and a Judge is to decide not merely whether the words are defamatory but also whether the words refer to the complainant.

Where the defamation imputes a crime to the complainant and the accused pleads justification there must be the same strictness of proof as on a trial for such crime.

Application for Revision by the accused under section 435 of the Code of Criminal Procedure.

The material facts appear from the judgments :

The Rule came on for hearing before Newbould and B. B. Ghose JJ who delivered the following judgments :

February, 12.

Newbould J. : The petitioner Protap Chandra Guha Roy was tried and convicted by the Sub-Divisional Magistrate of Faridpur on three charges of defamation and was sentenced under section 500 of the Indian Penal Code to one year's simple imprisonment for each offence, the sentences to run concurrently. On appeal to the Sessions Judge of Faridpur his conviction on the third charge was set aside and the sentences were reduced to six months' simple imprisonment on each of the two charges on which the conviction was upheld, these sentences also running concurrently. The petitioner has obtained an open Rule from this Court calling upon the District Magistrate and the complainant to show cause why the conviction of and the sentence passed on the petitioner should not be set aside or such other orders passed as to this Court may seem fit.

The two charges in respect of which the petitioner's conviction has been upheld are as follows :

" Firstly, That you on or about the 13th day of June, 1923 at Barhamganj P. S. Silchar defamed the complainant by making and publishing the following imputation in your speech at a public meeting concerning the police force employed at Char Manair of which the complainant was a member and the principal officers in charge of the investigation to the effect that not to speak of the police only but the British Government themselves and the superior officers including from the District Magistrate down to the Daroga and Chaukidars were all beasts and pigs in their conduct, intending to harm and knowing and having reason to believe that it would harm the reputation of the said complainant and the police force employed at Char Manair and that you thereby committed an

offence punishable under section 500 Indian Penal Code and within my cognizance.

"Secondly, That you on or about the 17th day of June, 1923, at Faridpur P. S. Katwali defamed the complainant by making and publishing in your speech at a public meeting the following imputation concerning the police force employed at Char Manair of which the complainant is a member and the principal officer in charge of the investigation to the effect that the police force employed at Char Manair had bitten off the nipple of the breast of a woman and had bitten the cheek of a woman nine months pregnant intending to harm and knowing and having reason to believe that such imputation will harm the reputation of the complainant and the police employed at Char Manair, and that you thereby committed an offence punishable under section 500 Indian Penal Code within my cognizance."

The complainant is Rasiduddin Khan a Sub-Inspector of police. On the night of the 16th May, 1923 a dacoity was committed in the house of one Adu Mulla in village Char Manair. In consequence of information received a body of police under another Sub-Inspector Badaruddin Ahmed arrived there while the dacoity was going on. For some reason that has not been made clear the Sub-Inspector Badaruddin and his party were attacked and kept confined by the villagers of Char Manair. Rasiduddin Khan was the Sub-inspector in charge of Sadarpur Police Station in whose jurisdiction Char Manair is situate. As such he investigated both the case of dacoity and the case of assault on the police mentioned above. The petitioner who is a member of the District Congress Committee made several speeches and the charges set out above relate to statements he is alleged to have made in two of those speeches.

A great deal of time has been wasted in the lower Courts owing to their having investigated issues that did not arise on the charges framed and the defence set up by the petitioner. The charges though not well worded have evidently been framed on the case for the prosecution that the complainant is one of an association of persons, the police force employed at Char Manair, and that imputations have been made against this collection of persons as such, so as to amount to defamation as defined in section 499 Indian Penal Code with special reference to Explanation 2 of that section. The main defence of the petitioner is a denial that he defamed the complainant. Though he does not deny having made imputations against some members, of the police

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force employed at Char Manair, he contends that these imputations are not directed against the whole body of members of that force and were not defamatory of the complainant either individually or as a member of that body. His case is that so far as he made general imputations they were criticisms of the acts of the Government and so far as he made imputations of definite acts, they were against Bengali constables only and not against the whole police force at Char Manair. He has attempted to justify the accusations of the constables but no attempt has been made to justify any imputation against the complainant. Consequently it is irrelevant whether the imputations against the constables were true or were made in good faith and it is unnecessary to consider the evidence relating to these issues.

As regards the charges on which the petitioner has been convicted the first contains a definite allegation that the complainant was defamed by an imputation concerning the police force employed at Char Manair of which he was a member. The words set out in the charge are not mere abuse and are clearly defamatory. The only defence worthy of serious consideration that is made to this charge is a denial that such words were used. The principal witness as to the words used in the speech delivered at Barhamganj is Ansar Ali (P. W. No. 6) a Sub-Inspector who took written notes of the speech in long hand Bengali. For the petitioner it is urged that the defamatory words set out in the charge are not found in these written notes (Ex. 7) and therefore the charge must fail. But the written notes do not purport to be a complete report of the speech. I see no reason why this witness with the assistance of these should not be able to remember that these words were used. Further the charge is not that the petitioner used these actual words but that he used words of this effect. That he used words imputing bestial conduct to the police force engaged at Char Manair appears not only in the written notes but is also supported by the evidence of Mahabatulla an Assistant Sub-Inspector of Police (P. W. 7) and three non-official witnesses (P. W. 20, 21 & 22). From their evidence it is clear that these imputations were made against that police force as a whole and not against the Bengali constables only. This evidence is un rebutted and justifies the findings of the lower Courts, that the first charge has been established.

In my opinion the conviction on the second charge cannot be upheld. Though the learned Sessions Judge finds that in the speech delivered at Faridpur, the whole police force at Char

Manair were attacked by the petitioner, this is not sufficient to support a conviction on this charge as framed. The charge does not relate to the whole speech but to portions alleging certain definite acts of brutality. It is not suggested that the complainant personally was accused of these acts. The imputations were not against a collection of persons as such but against some individual members of that collection of persons. To accuse the police force of biting off a nipple of a woman or biting a woman's cheek is absurd on the face of it and no such absurdity is to be found in the report of this speech Ex. 12, the accuracy of which is not seriously disputed. The prosecution might have been able to make out a case of defamation by inuendo on the allegation that the speech implied that the officer in charge of the investigation was responsible for the acts of his subordinates but the charge as framed does not require the petitioner to meet such a case.

It was not argued before us that the sentence was too severe.

I would therefore make this Rule absolute to this extent and reverse the finding and sentence convicting the petitioner on the second charge. I would not interfere with the conviction and sentence on the first charge.

I regret that I feel compelled to differ from my learned brother. As this difference will necessitate a reference to a third Judge I think it necessary to express my opinion shortly on some other points though I have held them to be irrelevant to the issues that really arise in the case.

The plea of *veritas* entirely fails. In both the judgments of the lower Courts, good reasons are given for holding that the evidence to support the charges of misconduct against the constables is totally false. No attempt was made at the hearing of this Rule to meet the arguments in these judgments on which these findings were based. I can attach no weight to the argument that so many women would not have made such complaints unless there were some ground for them. It amounts to no more than saying that if enough mud is thrown some will stick.

I am unable to accept the plea that these accusations were made in good faith. It is impossible that a man of the petitioner's intelligence and education could have believed the stories that were told to him. I have no doubt that he made these false imputations not believing them to be true but out of hatred of the British Government.

The learned Sessions Judge has written in his judgment that

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there he is inclined to hold that there was some kind of rough handling of Gaizulla and also that there might have been some rough handling such as the catching hold of women's hand, pulling at their cloth etc. There is no credible evidence to support a judicial finding of the facts. The petitioner may have believed that there was a substratum of truth in the stories that were told to him but even so it was not for the public good to make these false charges. On the contrary by supporting grossly false exaggerations he made it more difficult for the truth to be ascertained and the offenders, if any, to be punished.

As my learned brother and myself are divided in opinion, the case with our opinions thereon will be submitted to the Chief Justice in order that they may be laid before another Judge of the Court under section 429 read with section 439 of the Code of Criminal Procedure.

B. B. Ghose J : I regret I have not been able to agree with my learned brother on all the questions and as I have come to a different conclusion I give my reasons in some detail.

This Rule was obtained by the petitioner against his conviction and sentence under two charges of defamation under Sec. 500 I. P. C. by the Sessions Judge on appeal from a conviction by the trial Court. The Sessions Judge acquitted him of one of the three charges on which he was originally convicted and reduced the sentence from one year's to six months' simple imprisonment on each charge, the sentences to run concurrently. The facts are that there was a dacoity in the house of one Adiladdi or Adu Molla of village Char Manair on the 16th of May 1923. When the dacoity was going on six constables under two Sub-Inspectors arrived at the place and they entered the house and succeeded in capturing three of the dacoits. The villagers turned out and apparently mistaking the police men for dacoits assaulted them and kept them tied up in the house of Adu Mollah. Information reached the Sadarpur thana within the jurisdiction of which Char Manair is situated, next morning, of the dacoity as also of the police men having been tied up and police men in two batches arrived at the village. The first batch of police men released the men who had been kept tied up the previous night. The complainant Sub-Inspector Rasiduddin arrived at the village with the 2nd batch of men on the 17th May in the afternoon. Other police officers also came from other thanas. On the arrival of the police at the village almost all the male population fled away leaving the women behind them. On the 18th May house to house search was made

in the village by police, and the police remained there for several days making enquiries in both the cases, of assault on the police and of dacoity. The petitioner heard stories of oppressive acts committed by the police in the village, came there early in June with some other persons, saw many of the women who were alleged to have been maltreated and other persons and took down notes of what he had been told. Leaving the village with the information he had obtained he delivered three speeches in three different places in which he is alleged to have made defamatory statements with regard to the complainant. We are not now concerned with the third charge of which the petitioner has been acquitted by the learned Sessions Judge. We have to deal with the first two charges only. I should first dispose of two questions of a preliminary nature. It was urged that the complaint is not sustainable because it was made at the instance and under the orders of the superior officer of the complainant and not of his own motion. I do not think there is any substance in this contention. If the complainant has been defamed it is of no consequence that he complained under the orders of his superior officer in order to clear his character, although if left to himself he might not have taken the trouble of prosecuting the offender. The second question relates to the rejection of the notes taken by the petitioner of the statements made by the villagers which he sought to prove in the trial Court. The Sessions Judge on appeal admitted the notes of statements of those persons only who were called as witnesses at the trial presumably as corroborative of their evidence but rejected the rest. In my opinion the petitioner was entitled to prove the notes as evidence of his good faith and they were relevant on the question, although the person who made the statements were not examined. I hold that the notes were wrongly rejected, but I do not think there should be an order for retrial on that ground as there are sufficient materials on the record for deciding the question.

The charges we have to deal with are these—

“Firstly, that you etc. etc. defamed the complainant by making and publishing the following imputations in your speech at a public meeting concerning the police force employed at Char Manair of which the complainant was a member and the principal officer...to the effect that not to speak of the police only but the British Government themselves and the superior officers including from the District Magistrate down to the Daroga and Chowkidars were all beasts and pigs in their conduct, intending to harm etc. etc.

“Secondly—that you etc. etc. defamed the complainant by making

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...the following imputation...to the effect that the police force employed at Char Manair had bitten off the nipple of the breast of a woman and had bitten the cheek of a woman etc. etc."

I shall now deal with the questions raised as applicable only to the first charge. It is urged that the words are merely abusive and not defamatory. General words of abuse may not be defamatory but I cannot hold that to speak of a person that he is a beast and a pig in his conduct is not defamatory. The next plea is that the petitioner did not utter the words set out in the charge but only spoke about the beastly oppression by the constables. There cannot be any doubt that the words complained of as constituting the offence must be set out in the charge and proved before the accused can be convicted. When there is a denial, the evidence in support of the prosecution must be scrutinized. The notes of the speech were taken in longhand by P. W. 6 who says the accused spoke fluently and he could not take down all that the accused said. In his notes Exhibit 7 the following words occur,—"what oppression has been committed on women of 14 to 30 years, for which it is the duty of every one of us to extirpate the police like dogs, hogs and (illegible). Why the police only, the barbarous British Government itself from the highest officer the District Magistrate down to the Daroga Duffadar and Chowkidar all are beasts (illegible)." These words are different from those set out in the charge. In his deposition the witness gives the words in Bengali which may be translated thus,—“We should try to extirpate the police with our heart's blood like despicable dogs, pigs and goats. Why the police only—the Daroga, Magistrate, Duffadar, Chowkidar all behave like beasts and pigs.” These also are not the same words as in the charge. The other witnesses who speak about the words uttered by the petitioner are P. W. 7, P. W. 20, P. W. 21 and P. W. 22. I need not set out in detail what each witness says. It is sufficient to say that the words ascribed to the accused are differently stated by each witness and the petition of complaint also puts them differently. In this state of the evidence I cannot hold that it has been proved, that the accused spoke the words stated in the charge, and it would not be correct to say that the words given in the different versions have the same meaning. When spoken words are alleged to have constituted the offence a very slight alteration of a word may give quite a different meaning to them. From the petition of complaint and also the evidence of P. W. 6 it is clear that a distinction is made between the police and the superior officers, as Daroga and Duffa-

dar as well as chowkidar. This supports to some extent the plea of the accused that what he said was in relation to the constables and not with reference to the superior officers. In my judgment the evidence does not substantiate this charge and it must therefore fail on that ground. The next point urged is that the words the accused is charged with are too general and cannot be defamatory of an individual such as the complainant. The case of *Eastwood v. Holmes* (1) is cited in support, where it was observed by Willes J that if a person wrote all lawyers were thieves, no particular lawyer could sue him for libel. It seems to me that the words in the charge "The British Government themselves and the superior officers including from the District Magistrate down to the Daroga and Chowkidars were all beasts &c" are too wide to admit of the construction that any particular police officer was defamed. The other questions raised apply equally to both the charges. The first question is whether the complainant was the person defamed or in other words whether he is a "person aggrieved" by the offence as contemplated under section 198 of the Criminal Procedure Code, so as to entitle him to maintain the prosecution. This is what is stated in the petition of complaint; "That it appears therefore that in making the above charges Dr. Protap Chandra Guha Rai has intended to harm the reputation of police and other high officials of the British Government and the Government themselves..... These allegations are being announced throughout the district and it is therefore necessary that their falsity should be proved in the most effective manner, viz., by trial in Court of law &c." The learned Standing Counsel relies on explanation 2 of section 499 Indian Penal Code as giving the complainant the right to maintain the prosecution. That explanation runs as follows:—"It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such." The contention seems to be that in this case there was defamation of the police force i. e. a "Collection of persons as such". As far as I am aware those words in the explanation have not been judicially dealt with in any reported case. In my opinion those words mean that a collection of persons as such may be collectively defamed in the same manner as a 'company'. The general principles on which a company may be said to have been defamed would therefore apply equally to the case where it is alleged that a collection of persons as such has been defamed. Those general principles were formulated by Chief

(1) (1858) 1 F. and F. 347.

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Baron Pollock in *Metropolitan & Co. v. Hawkins* (1) where he said — "It (a corporation) could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may". This was adopted in *Mayor &c of Manchester v. Williams* (2) where it was laid down that a corporation may sue for a libel affecting property, not for one affecting personal reputation. Similarly, Lopez L. J. said in *South Helton Coa Co. v. North Eastern News Association* (3) "A corporation or company could not sue in respect of a charge of murder, or incest or adultery because it could not commit those crimes. Nor could it sue in respect of a charge of corruption or of an assault because a corporation cannot be guilty of corruption or of an assault although the individuals composing it may be". These observations are quite apposite to the question before us and in my opinion the police force as such cannot complain of any imputation as regards its personal reputation because it cannot be guilty of beastly conduct, nor can the collective body be guilty of the offence of biting off the nipple of the breast of a woman or of biting the cheek of a woman. The matter may be tested in another way. Suppose somebody laid a complaint before a Magistrate in terms of the words of the charges in this case, would any Magistrate issue process against the police force as such or any member of the police force? I am sure no Magistrate would. In my judgment therefore the charges fail on the ground that they refer to the personal conduct only of a collection of persons as such.

I shall next deal with the case of *The King v. Osborne* (4) on which the learned Standing Counsel relied strongly. I take the report of the case from 2 Swanston as it is fuller than the report in Barnardiston. The report runs as follows: "The paper on which the information was prayed, contained an account of a murder committed on a Jewish woman and child by certain Jews lately arrived from Portugal and living near Broad Street, because the child was begotten by a Christian, and the affidavits set forth that several persons mentioned therein, who were recently arrived from Portugal, and lived in Broad Street were attacked by multitudes in several parts of the city, barbarously treated and threatened with death, in case they were found abroad any more. *Strange*

(1) (1859) 4 H. & N. 87 (90).

(2) (1891) 1 Q. B. 94.

(3) (1894) 1 Q. B. 133, (141).

(4) 2 Barn, 138; 2 Swan. 503n.

showed cause against the information, and that it could not be granted as for a libel, because if not appearing who the persons reflected upon are, no judgment can be given for the King; as in *King v. Orme* (1).

"*Sed per cur.* Admitting an information for a libel may be improper, yet the publication of this paper is deservedly punishable in an information for a misdemeanour, and that of the highest kind; Such sort of advertisements necessarily tending to raise tumults and disorders among the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarce practicable, and totally incredible". It seems to me the Court held in that case an information for a libel was improper but it was granted for some other misdemeanour, as tending to raise tumults &c. I do not think this case helps the prosecution. Nor does the case of *Rex v. Williams* (2) as in that case the imputation was against all the clergy in Durham and the libel was on every one of them. There is no imputation like that in the present case. I may also refer to the *Nil Darpan* case tried by the Supreme Court of Calcutta, cited, in Mayne's Criminal Law of India. There the words complained of were, "I present the indigo planter's mirror to the indigo planter's hands" Sir Barnes Peacock C. J. is reported to have observed on the words used,—“This certainly appears to me to represent to the indigo planters that if they look into this paper, they would see a true representation each of himself.” The true rule appears to be that if a person complains that he has been defamed as a member of a class he must satisfy the Court that the imputation is against him personally and he is the person aimed at before he can maintain a prosecution for defamation. It is argued on behalf of the Crown that the question whether the words are defamatory or not is a question of construction. This proposition is only partly true. In England the question as to how the words were understood by those to whom they were addressed is a question for the jury if the Judge holds that there is a *prima facie* case. Here when the case is not tried with the aid of a jury, the question must be decided by the Judge as a question of fact, and in deciding this question the following principle should be borne in mind. “All circumstances which were apparent to the bystanders at the time the words were uttered should be put in evidence, so as to place the jury as much as possible in the position of such bystanders and then it is for the jury to say what meaning such words would fairly have conveyed to their minds.”

(1) 1 Ld. Raym. 486.

(2) (1811) 3 Barn & Ald. 595.

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Odgers On Libel and Slander, 5th Ed. P. iii. We should not construe the words as we would a document of title according to rules of construction of deeds, and specially when the words spoken have not been proved with certainty, and we have to decide not merely whether the words are defamatory but also whether the words refer to the complainant. Applying these principles and taking all circumstances into consideration, I am of opinion that the words complained of in the charges have not been proved to have been used with reference to each and every member of the police force and the complainant cannot therefore be said to be a person aggrieved by the offence complained of. In my opinion the charges are not sustainable against the petitioner at the instance of the complainant.

In my opinion this is sufficient to dispose of the Rule, but as the matter must be placed before another Judge on account of our difference of opinion I must record my judgment as to whether the case falls under any of the exceptions to section 499 Indian Penal Code assuming that the complaint is otherwise sustainable. As regards the first exception i.e. the plea of truth, I agree with the learned Sessions Judge where he says that where the defamation imputes a crime to the complainant and the accused pleads justification there must be the same strictness of proof as on a trial for such crime. But in this case no crime was imputed to the complainant himself and the persons against whom the allegations were made were not before the Court. In this case no Court would be justified in pronouncing an opinion that the allegations against persons not before it were true without giving an opportunity to those persons to be heard. I pointed this out to the learned counsel for the petitioner when he was submitting that the allegations were true. All that the accused could establish in the present case was that there was *prima facie* evidence as to the truth of the allegations and which the accused might reasonably believe to be true, or in other words his good faith. It is contended on behalf of the Crown that the petitioner cannot urge the plea of good faith, because he says he spoke only about the conduct of the constables and all that he heard was about the conduct of the constables. If his plea that he spoke only about the constables is not accepted, the plea of good faith on his own statement is not maintainable. I do not think this contention can be accepted, as it seems to me not proper that one part of the statement of the petitioner should be rejected and the other part used as an admission of guilt. In one portion of his argument the learned

Standing Counsel said that although the members of the police force were fluctuating, the imputations might be held to be on the complainant because the men were under his control and he was at the place all along. If that be so, the petitioner may establish his good faith by giving evidence with reference to the conduct of the constables. It was however not argued on behalf of the Crown that the petitioner had no reasonable cause for believing the statements he had heard in the village and that he has not succeeded in establishing his good faith on that ground. But as the learned Sessions Judge came to a different conclusion I think it right to record my opinion on the question. It appears to me that on the finding of the Sessions Judge himself some acts of oppression were committed there. Dealing with the matter of Gaizuddi who was alleged to have been beaten with the result that he died, the learned Judge observes, "Moulvi A. Quadery has stated in his deposition that although he found no marks of injury on the man and most of the people there said that the man had epilepsy, some people also were saying at the time that Gaizudi had been taken by constables. I am therefore inclined to hold that there was some kind of rough handling on him." This witness was the Deputy Superintendent of police and he saw the man when he was in a dying condition. He also deposed that Deputy Magistrate, Babu Mani Mohan Ghose P. W. 14 who was there also heard about this at the time. It is regrettable that none of these officers made any enquiry at that time about the allegations, which might have enabled them to find out the truth at once. The Sessions Judge further held that there "might have been some rough handling such as catching hold of women's hands, pulling at their cloth etc." I cannot agree with the Deputy Magistrate P. W. 14 above-named that pulling women by the hand, taking away their cloth, making woman naked, prodding them with guns, could be legally justified. It is not necessary for the purpose of this case to examine the evidence regarding the various cases dealt with by the Sessions Judge. But I think it would be right to refer to some of the cases; one Fuljan Bibi came into Court and deposed amongst other things that the nipple of her breast was bitten off. She was not asked whether she was willing to submit to an examination of her person, but was disbelieved because another witness who went to the village to make enquiries stated that the name of another woman was given to that witness as having been so maltreated. I do not think this to be satisfactory. The case of one Haju Bibi also deserves notice. She complained that she had been raped. It was alleged that there

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was an eye witness, a boy of about 16 years named Noai. Noai was examined by the Deputy Magistrate several times, a rather unusual procedure. The matter was adjourned for the identification of the man. The Deputy Magistrate P. W. 14 says, "Noai witness identified constable Mir Ahmad Ali as the ravisher. The constable was mixed up with 30 others." After this identification the case was dismissed. In this case I think either the constable should have been tried for the offence alleged or the woman for bringing a false charge against an innocent man. But as I have said it is immaterial for the present case whether the stories were true or false. In my opinion however the petitioner had reasonable grounds for believing in the truth of the allegations made to him having regard to all the circumstances and as it is also not argued on behalf of the Crown that there were no reasonable grounds for the petitioner's belief, I hold that the case comes under the ninth exception of section 499 Indian Penal Code although the language of the petitioner is otherwise objectionable. On all these grounds I would make the Rule absolute and acquit the accused of the charge. I do not think it necessary to refer to some other points urged by the petitioner's counsel as in my opinion they fall within one or other of the questions I have dealt with.

Owing to this difference of opinion, the case was heard by Mr. Justice Buckland under section 429 of the Code of Criminal Procedure.

Messrs. S. N. Haldar, B. K. Chowdhury and D. N. Sen, Babus Suresh Chandra Taluqdar, Asita Ranjan Ghosh, Debendra Nath Bhattacharyya, Bhudar Haldar and Manmatha Nath Ray (Jr.) for the Petitioner.

Mr. B. L. Mitter (Standing Counsel) for the Opposite Party.

March, 23.

Buckland J. : The petitioner in this case has been tried and convicted by the Sub-Divisional Magistrate of Faridpur on three charges of defamation and was sentenced under section 500 I. P. C. to one year simple imprisonment, these sentences to run concurrently.

On appeal to the Sessions Judge of Faridpur his conviction on the third charge was set aside and the sentences were reduced to 6 months' simple imprisonment on each of the two charges on which the conviction was upheld, these sentences also to run concurrently.

He has obtained a Rule from this Court calling upon the District Magistrate and the complainant to show cause why the con-

viction and the sentence passed upon him should not be set aside or such other orders passed as to this Court may seem fit.

The Rule came on for hearing before my learned brothers Newbould and B. B. Ghose JJ. who are equally divided in opinion. The case with the opinions of the learned Judges has been laid before me under section 429 Code of Criminal Procedure.

The charges in respect of which the petitioner's conviction has been upheld by the Sessions Judge are as follows :—

Firstly.—That you on or about the 13th day of June 1923 at Barhamganj P. S. Sibchar, defamed the complainant by making and publishing the following imputation in your speech at a public meeting concerning the police force employed at Char Manair of which the complainant was a member and the principal officer in charge of the investigation to the effect that not to speak of the police only but the British Government themselves and the superior officers including from the District Magistrate down to the Daroga and Chowkidars were all beasts and pigs in their conduct, intending to harm and knowing and having reason to believe that it would harm the reputation of the said complainant and the police force employed at Char Manair, and that you thereby committed an offence punishable under section 500 Indian Penal Code and within my cognizance.

Secondly.—That you on or about the 17th day of June 1923, at Faridpur P. S. Kotwali, defamed the complainant by making and publishing in your speech at a public meeting the following imputation concerning the police force employed at Char Manair of which the complainant was a member and the principal officer in charge of the investigation to the effect that the police force employed at Char Manair had bitten off the nipple of the breast of and had bitten the cheek of a woman nine months' pregnant intending to harm and knowing and having reason to believe that such imputation will harm the reputation of the complainant and the police employed at Char Manair and that you thereby committed an offence punishable under section 500 Indian Penal Code and within my cognizance. It has been submitted on behalf of the petitioner that these charges are defective.

Under section 499 Indian Penal Code, whoever by words makes or publishes any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person is said to defame that person.

The person concerning whom the imputation is made, whom

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it is intended to harm in his reputation, and who in consequence is defamed is the same throughout.

There is confusion in these charges between the complainant and the police force at Char Manair in relation to the various ingredients of the charge.

It is charged that the complainant was defamed by imputations made concerning the police force at Char Manair, and that the reputation intended to be harmed was that of the complainant and the police force.

It is obvious that charges so framed do not conform to the requirements of the definition.

The defects seem to have originated in a failure to appreciate explanation 2 to the section and the principles applicable when the words making the imputation appear to be general expressions but the complaint is that they are directed against a particular individual.

The explanation in my opinion is intended to include a company or an association or collection of persons as such within the word "person" as used in the definition so that the latter should not be limited to individuals.

In a case in which the explanation is properly called into use the identity of the company or association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning them as such with the intention of harming their reputation so that thereby they are defamed. An imputation concerning a company or association of persons as such, and the last two words of the explanation are most material to its correct application, cannot by virtue of this explanation justify a charge of defaming an individual, and a charge cannot combine the explanation with the definition for such a purpose. Nor does it carry the matter any further to state as has been done by the charges in this case that the complainant was a member of the police force at Char Manair.

The charges seem to have assumed that the police force at Char Manair is an association or collection of persons such as the explanation contemplates; but without expressing any definite opinion on the point as it does not directly arise I have considerable doubt whether such a view is correct. *Aldridge v. Barrow* (1) which is some authority on the point was a civil suit but that would not appear to affect the principle [vide the observations of Fletcher Moulton L. J. in *Jones v. E. Hulton & Co.* (2)].

(1) (1907) 1 L. R. 34 Calc. 662.

(2) (1909) 2 K. B. 344 (460).

In this case the petitioner is charged with having defamed an individual. The imputations in the charges are general expressions assuming that they concern the complainant. This would appear to be the case notwithstanding the reference in the first to the District Magistrate and the Daroga, because neither of those officers, who are capable of identification, if the investigation referred to in the charge is specified, which has not been done, is the complainant in the case. As regards the second charge though no one is referred to by name or by reference to his office in the imputations charged, the nature of the imputations is indicative of the fact that an individual may be meant.

It may be that the general nature of the imputations has led to the confusion in the charges. There is no necessity for that to have occurred.

The cardinal rule is that the offence consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it: Per Lord Loreburn L. C. in *E. Hulton & Co. v. Jones* (1). Lord Shaw of Dumferline: in his speech cited *Bourke v. Warren* (2) in which Abbott C. J. said—"The question for your consideration is whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel: it is sufficient if those who know the plaintiff can make out that he is the person meant."

Following upon the rule so laid down it becomes a matter of comparative indifference whether the words are general or refer to a specific individual, but lest this be taken too literally I should explain it may be that an individual is as much defamed by words apparently only of more general application as by words referring to him by name. The test is that formulated by the learned Judges whose observations I have quoted.

A very good instance of a case where defamatory matter may appear only to apply to a class of individuals yet, if the descriptions in such matters are capable of being, by innuendo, shown to be directly applicable to any one individual of that class an action may be maintained by such individual in respect of the publication of such matter, is to be found in *Le Fanu v. Malcolmson* (3). The defamatory matter is too long to be reproduced; all that I need quote are a passage from the judgment of Lord Cottenham L. C. :—

(1) (1910) A. C. 20.

(2) (1886) 2 C. & P. 307.

(3) (1848) 1 H. L. C. 637.

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"If a party can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known who they are, as the jurors have found it to be here, and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbours as being the parties alluded to; and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels" and the following passage which is to be found in the judgment of Lord Campbell:—

"The first objection which has been relied on by the counsel for the plaintiff in error, who certainly has argued the case with his usual ability, and has brought forward all the arguments that learning and talent could supply; the first objection is that this libel applies to a class of persons, and that therefore an individual cannot apply it to himself.

"Now I am of opinion that that is contrary to all reason, and is not supported by any authority. It may well happen that the singular number is used; and where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and christian name were ten times repeated."

The confusion of ideas which these charges disclose makes it impossible for a proper trial to be held. To give but one instance the question of the relevancy of evidence will be approached from a different standpoint if the charges stand as drawn or if they are drawn as they should be in accordance with the principles appli-

cable to the case. I may even go so far as to say that there has been no trial at all of the petitioner for having defamed the complainant for a trial on these charges cannot be said to have been such a trial.

In the circumstances the evidence and the merits generally have not been gone into. As I appreciate the situation there should be a new trial upon charges properly drawn, and in that view I ought to express no opinion on the merits even had they been fully argued. The question is as to the form the final order should take, as to which I have now heard learned counsel for the parties.

The order will be that the conviction and sentences by the Sessions Judge, Faridpur, be set aside, and I direct that the case be retried by the District Magistrate, Faridpur, or by such Subordinate Magistrate to whom he may assign the case, other than Babu A. R. Bose, Sub-Divisional Magistrate of Faridpur, before whom the previous trial was held.

A. T. M.

Conviction set aside : Retrial ordered.

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APPELLATE CIVIL.

Before Mr. Justice Cuming, and Mr. Justice Chakravarti.

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v.

PANCHANAN MAZUMDAR AND OTHERS.*

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May, 18.

Ejectment—Land taken for shop—Lessee subsequently taking land for cultivation—Homestead—Bengal Tenancy Act (VII of 1885), Sec. 182—Transfer of Property Act (IV of 1882), Sec. 111.

Section 182 of the Bengal Tenancy Act is not, but the provisions of the Transfer of Property Act are, applicable to a case where land was taken not for the purpose of a homestead from which the lessee was to cultivate his jote but for the purpose of a shop and is used for that purpose.

*Appeal from Appellate Decree No. 2110 of 1922, against the decree of Babu Banamali Sen, Subordinate Judge of Rangpur, dated the 22nd May, 1922, reversing that of Babu Ramesh Chandra Dey, Additional Munsiff, Kurigram, dated the 30th July, 1921.

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Appeal by the Plaintiffs.

Suit for ejectment.

The material facts appear from the judgment.

Dr. Sarat Chandra Basak and *Babu Asita Ranjan Ghose*
for the Appellants.*Mr. Atul Chandra Gupta* and *Babu Radhika Ranjan Guha*
for the Respondents.

The judgments of the Court were as follows.

May, 12.

Cuming J.—In the suit out of which this appeal has arisen the plaintiffs sued to eject the defendants under section 111 of the Transfer of Property Act on the ground that their lease had expired. The facts of the case are these: the defendants first of all took a lease of some 5 kanis of land in 1310 in Lalmanirhat Bandar for a term of 5 years for the purpose of establishing a shop on it. The defendants then took one additional kani of land at a total rental of Rs. 69 per annum for 6 kanis of land and there was a fresh lease for 5 years. At the expiry of the term the plaintiffs demanded an enhancement of rent and a fresh lease was given for another 5 years from 1322 to 1326 at a rental of Rs. 78 per annum. The defendants executed a *kabuliat* in the plaintiffs' favour on the 1st Jaistha 1322. This lease expired in 1326 and the defendants were asked by the plaintiffs to evacuate the land. This they refused to do and hence this suit. The case of the defendants was that they were settled on the land in 1307 as raiyats and that the *kabuliyat* was merely a confirmatory lease which did not set forth the real purpose for which the lands were taken, that the defendants were governed by the Bengal Tenancy Act being occupancy raiyats and were not liable to be ejected.

The first Court held that the lands had been taken for the purpose of a shop and that section 182 of the Bengal Tenancy Act had no application. In appeal the learned Subordinate Judge held that the defendants had failed to prove their case that they took the land for agricultural purpose in the year 1307. He found that they took the land for the purpose of establishing a shop. He further found that they subsequent to the taking of the land for the shop had acquired certain other occupancy jotes in the vicinity and hence he held that under the provisions of section 182 of the Bengal Tenancy Act they must be considered to be holding the lands that had been taken for the purpose of a shop as occupancy *raiya*s and hence they could not be evicted. The learned

Subordinate Judge in coming to this conclusion relied upon the case of *Bhikariram Bhagat v. Maharaj Bahadur Singh* (1).

Dr. Basak who has appeared for the appellants contends that section 182 has no application to the present case and that the ruling relied upon by the learned Subordinate Judge of the lower appellate Court is clearly distinguishable for in that case the tenant had already been a raiyat before he took the land for the purpose of a shop and the finding was that the land was taken for a shop and also for cultivating as a raiyat other lands using the land in suit a homestead. The case is clearly distinguishable from the present case. I do not think that the provisions of section 182 of the Bengal Tenancy Act can be held to apply to the present case. The land in this case was admittedly taken not for the purpose of a homestead from which the defendants were to cultivate their jotes but was taken for the purpose of a shop and is still used for that purpose. It is situated in a part of Lalmonirhat bunder which is a large Bazar. The defendants admittedly had another homestead and it would be straining the law if I were to hold that they were holding this land as their homesteads. Their lease shows that it was for the purpose of a shop that the land was taken and had been used for that purpose only. Therefore it cannot be said that the defendants have been holding that land as homestead.

In my opinion section 182 has no application to the present case and this land is governed by the provisions of the Transfer of property Act and not by the provisions of the Bengal Tenancy Act.

In that view the appeal must succeed. The decree of the lower appellate Court is set aside and that of the first Court restored. The appellants will get their costs of this Court as well as of the lower appellate Court.

Chakravarti J. I agree with my learned brother in the order which he has proposed to make. I wish only to add a few words. The learned advocate for the respondents relied upon the case of *Bhikariram Bhagat v. Maharaj Bahadur Singh* (1) upon which the lower appellate Court also relied. That case is distinguishable from the facts of the present case. The learned Judges in the course of their judgment in the case cited laid down the law in these words : " But supposing that during the first 2 or 3 years during which the defendants merely held their shop and resided on the disputed land, and held jotes at Nalhati, they could not

(1) (1915) I. L. R. 43 Calc. 195.

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invoke the aid of section 182 of the Bengal Tenancy Act, there can be no manner of objection under a long course of rulings of this Court to their claiming the protection of that section after they became agriculturist at Sanko and carried on agriculture from their residence at Sanko which was also used as a shop." Now in the present case the learned Subordinate Judge has found that the land was taken for the purpose of establishing a shop and not for the purpose of carrying on agricultural operation as was claimed by the defendants. The learned Judges in the case cited pointed out that the land in that suit was taken primarily for the purpose of carrying on cultivation and the use of it as a shop was only incidental use. In the present case the lease when it was taken was clearly one governed by the provisions of the Transfer of Property Act. The main purpose or the only purpose for which it was let out by the landlords was for the defendants to establish a shop in a *bazar*. In these circumstances, I agree with my learned brother in the judgment just delivered that section 182 of the Bengal Tenancy Act has no application to this case.

A. T. M.

Appeal allowed.

*Before Sir Ewart Greaves, Knight, Judge, and Mr.
Justice B. B. Ghose.*

GOUR CHANDRA DAS

v.

SUBASHINI DASL.*

CIVIL.

1925.

June, 10.

Ejectment—Solenama—Joint tenancy—Void decree—Execution sale—Title of third party, if can be pleaded.

The principle of joint tenancy is unknown to Hindu law, except in the case of coparcenery between the members of an undivided family: *Jogeswar v. Ram* (1)

A died leaving his widow B, grandson C and grand-daughters D and E. C died leaving his widow F. In a suit on a mortgage executed in favour of A, B as guardian of C purchased the mortgaged property in execution. Thereafter F

*Appeals from Appellate Decrees Nos. 1262 and 1263 of 1923, against the decision of R. F. Lodge Esq, District Judge of Murshidabad, dated the 15th December, 1922, modifying that of Babu Rabindra Kumar Basu, Munsiff, Additional Court at Jangipur, dated the 27th September, 1921.

(1) (1896) I. L. R. 23 Calc. 670; L. R. 23 I. A. 37.

brought a suit against her for possession of the properties left by her husband C. This suit was compromised by a *solenama*, which stipulated that certain properties, including the properties in suit, would be possessed by B during her lifetime and after her death, her granddaughters D and E would get them. Afterwards rent suits were brought by the landlord against B. Decrees in rent suits were passed after the death of B without bringing on the record the legal representatives of B. The rent decrees were then put into execution and the defendant purchased the properties and took possession through Court. D died sometime after this and the present suits were brought by E for possession of the entire lands in dispute :

Held, that the mere fact that F's representative did not dispute the interpretation of the *solenama* could not confer any right on E to eject the purchaser.

That the purchaser was entitled in such a suit to plead the title of a third party and to show that the plaintiff was not entitled to the whole of the interest she claimed.

Appeal by Defendant No. 1.

Suit for ejectment.

The material facts appear from the judgment.

Babu Urukram Das Chakravarty for the Appellant.

Mr. Mahendra Nath Ray and *Babu Satindra Nath Mukerjee* for the Respondent.

The judgments of the Court were as follows :

B. B. Ghose J : These two appeals are against the judgments and decrees of the District Judge of Murshidabad modifying those of the Munsiff of Jangipur. There were two suits for declaration of title and *khas* possession of two jamas. The lands originally belonged to Gagan Chandra Majhi and Uday Chandra Majhi and were mortgaged by them to one Keshab Choudhury. Keshab Choudhury died sometime in 1889 and left a widow, a grandson and two granddaughters by his predeceased son. The widow was named Rukmini. The grandson Asutosh died in the year 1899 leaving a widow Rajabala. The two grand-daughters of Keshab were named Subashini and Bindubasini. Rukmini, as guardian of Keshab's grandson Ashutosh, enforced the mortgage and purchased the mortgaged property in execution of the mortgage decree on the 16th June 1892. Thereafter, Rajabala brought a suit against her for possession of the properties left by her husband Ashutosh. This suit was compromised by a *solenama* dated the 22nd January 1902. Under that *solenama*, it was stipulated that certain properties, including the properties in suit, would be possessed by Rukmini during her life time and after her death her granddaughters Subashini and Bindubashini would get them and they being entitled

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to them would possess them (*Satvabati* and *Dakhalkarini*). Then in 1914 and 1915, two rent suits were brought by the landlord against Rukmini with regard to the lands in dispute. Rukmini died on the 14th January 1915 and decrees in the rent suits were passed after her death without bringing on the record the legal representatives of Rukmini. The rent decrees were then put into execution and then the defendant purchased the properties and took possession through Court in August 1917. Bindubashini died sometime in 1920. The present suits were brought by Subashini alone for possession of the entire lands in dispute. The Munsiff passed a decree in favour of Subashini with regard to 8 annas share on the ground that the rent decrees in execution of which the defendant No. 1 had purchased the property were void and infructuous as having been passed against a dead person. After the death of Rukmini, Subashini and Bindubashini were entitled to 8 annas share each of the properties in dispute and as the heirs of Bindubashini did not bring any suit, plaintiff was only entitled to a decree for joint possession of 8 annas share of the lands in each of the suits. There were appeals by both parties against the decree of the Munsiff. The District Judge held that by the terms of the *solenama*, the plaint lands went to Rukmini and after her death to her two grand-daughters for their lives and he further held that after the death of Rukmini her two grand-daughters Subashini and Bindubashini succeeded to the properties in dispute as joint tenants, and that after the death of Bindubashini, Subashini was entitled to the whole of the lands as the survivor of the two joint tenants. In that view, he passed a decree for the entire lands in favour of the plaintiff. The defendant No. 1 appeals, and the ground urged on his behalf is that the learned Judge was wrong in holding that Subashini and Bindubashini took as joint tenants. It ought to have been held that they were tenants in common. It was further contended that the two sisters were entitled to absolute interest in the properties and not only for their lives. It is not disputed before us that Subashini is not the legal heir of Bindubashini and the decree of the learned Judge can only be supported if his decision that the two sisters took as joint tenants and not as tenants in common is correct. There is nothing in the *solenama* which would show that the two ladies were to take as joint tenants. As was observed by the Privy Council in the case of *Jageswar, Narain Deo v. Ram Chandra Dutt* (1) "The principle of joint tenancy appears to be unknown to Hindu Law, except in the case of co-

(1) (1896) L. L. R. 23 Calc. 670.

parcenary between the members of an undivided family." The District Judge, therefore, was in error in holding that the two sisters took as joint tenants. The contention on behalf of the appellant that the ladies took an absolute interest was not persisted in, but it was argued that even if they took as life tenants the share which belonged to Bindubashini would revert to the true owner, and in this case it would be Rajabala. The mere fact that Rajabala's representatives do not dispute the interpretation of the *solenama* could not confer any right on the plaintiff to eject the defendant from the entire land. The defendant is entitled in a suit for ejectment to plead the title of a third party and to show that the plaintiff is not entitled to the whole of the interest she claims. The plaintiff's share is only 8 annas.

It must, therefore, be held that the plaintiff is entitled to recover possession of 8 annas share only in the lands in dispute. The judgment and decree of the District Judge must, therefore, be set aside and those of the Munsiff restored with costs in both appeals in this Court and in the lower appellate Court.

Greaves J :—I agree.

A. T. M.

Appeals allowed.

*Before Sir Hugh Walmsley, Knight, Judge, and Mr.
Justice Mukerji.*

ANANDA CHANDRA KACHARU

v.

BARADA KANTA DEY AND OTHERS.*

Limitation—Limitation Act (IX of 1908), Sch. I Arts. 36, 49—Suit for compensation for deterioration of oranges—Detention in Police Station.

Article 36 and not article 49, schedule I of the Limitation Act is applicable to a suit for compensation for deterioration of oranges owing to detention at the Police Station.

Appeal by the Plaintiff.

*Appeal from Appellate Decree No. 1537 of 1923, against the decree of Babu Nirode Ranjan Guha, Subordinate Judge, 2nd Court, of Faridpur, dated the 15th February, 1923, reversing that of Babu Ram Lal Banerjee, Munsiff, 2nd Court, at Madaripur, dated the 10th February, 1922.

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June, 24.

Suit for compensation.

The material facts appear from the judgment.

Babu Hemendra Chandra Sen for the Appellant.*Babu Prakash Chandra Majumdar* for the Respondents.

The judgments of the Court were as follows :

Walmsley J :—This appeal is preferred by the plaintiff. He brought a cargo of oranges to the Madaripore Bazar where there was a quarrel between him and the Ijaradar of the market about the payment of tolls. In consequence, the ijaradar informed the police and the result was that the boat of oranges was detained at the Thana for some days and, while so detained, the oranges deteriorated. The plaintiff brought the suit for compensation on account of the oranges so damaged. The learned Munsiff found that the plaintiff was entitled to a sum of Rs. 143 odd and gave the plaintiff a decree for Rs. 68-13-6 against certain of the defendants who had not compromised the case with the plaintiff as the defendant No. 2 had done. These defendants then preferred an appeal to the District Court and the learned Judge of the Court of appeal below held that the suit was barred by limitation. The suit was brought exactly three years after the date on which the boat was taken to the Thana and the learned Subordinate Judge's view was that the appropriate article of the Limitation Act applicable to the case was Art. 36 and not Art. 49 as held by the first Court. If the learned Judge was right in this view, then undoubtedly the suit was barred by limitation. On behalf of the plaintiff appellant, it is urged that Art. 49 is really the article applicable to the present case, and, in this connection, our attention has been drawn to the decision of a Full Bench of this Court in the case of *Mangun Jha v. Dolhin Golab Koer* (1). It appears to me that the case does not really assist us much here. In the present instance, I think we must go by the words of the articles and consider which of those articles does apply to the facts of the case. Clearly, the plaintiff did not bring the suit to recover any specific moveable property. He did not claim compensation against the defendants for having wrongfully taken any moveable property because the finding is that it was the police who took the cargo of oranges to the Thana. It was not a case for compensation for injuring the oranges or for compensation for wrongfully detaining the oranges because here again the finding is that it was the police who kept the boat at the Thana. It appears to me, therefore, that the substance of the claim cannot be brought within the purview of the words of Art. 49.

(1) (1898) I. L. R. 25 Calc. 692.

In my judgment, Art. 36 is the appropriate article applicable to the case. That being so, it must be held that the suit is barred by limitation. The result, therefore, is that the appeal is dismissed with costs.

Mukerji J :—I agree.

A. T. M.

Appeal dismissed.

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Walmesley J.

APPELLATE CRIMINAL.

Before Mr. Justice Suhrawardy, and Mr. Justice Panton.

ABDUL GANI BHUYA.

v.

KING-EMPEROR.*

CRIMINAL.

1925.

July, 14, 15.

Misdirection—Criminal Procedure Code (Act V of 1898 as amended by Act XVIII of 1923), Sec. 288—‘Duly recorded in presence of accused under Chap. XVIII’—Evidence recorded not for purposes of commitment—Effect of admitting evidence recorded by committing Magistrate—Evidence of witnesses, if can be believed in part.

The amendment of section 288 of the Code of Criminal Procedure by substituting the words ‘duly recorded in the presence of the accused under Chapter XVIII’ for the words ‘duly taken in the presence of the accused before the committing Magistrate’ is intended to cover cases where evidence may be recorded by the committing Magistrate but not for the purpose of commitment, as under section 219.

The evidence recorded by the committing Magistrate if admitted under section 288 of the Code of Criminal Procedure is to be treated as evidence for all purposes even as the basis of finding or verdict and on a par with any other evidence before the Sessions Court or as a substantive evidence on which the verdict of the jury or the judgment of the Judge can be based.

It is dangerous to lay down as a general rule of law that in this country it is not proper to believe the evidence of a certain witness in part.

The conviction of the accused under section 324 Indian Penal Code rested upon the evidence of three persons who spoke of the occurrence before the committing Magistrate but who in the Sessions Court declared that they knew

*Criminal Appeal No. 161 of 1925. against the order of J. Macnair Esq., Additional Sessions Judge of Mymensingh, dated the 2nd March, 1925.

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nothing about it. The basis of the verdict of the jury was the evidence of those witnesses recorded by the committing Magistrate and admitted by the Judge under section 288 Criminal Procedure Code :

Held, that the conviction based on the evidence admitted under section 288 was not wrong : *Queen v. Amanullah* (1) and other cases considered .

Where the Judge in his charge to the jury said : "It seems clear to me that these persons have decided to go as far as they possibly can towards altering their evidence in such a way as shall secure the acquittal of the two men here on trial. It is for you to say whether you feel convinced as to the three Magisterial depositions to an extent which would warrant you as prudent men in acting upon them :"

Held, that as the Judge did not direct the jury to look upon the evidence of witnesses who had retracted their statement before the committing Magistrate as suspicious and regard them with great caution, the charge was vitiated.

Appeal under section 410 of the Code of Criminal Procedure by the Accused.

The material facts appear from the judgment.

Babu Suresh Chandra Taluqdar for the Appellant.

Mr. Herambo Chandra Guha for the Crown.

Suhrawardy J :—The appellant Abdul Gani Bhuya has been convicted under section 324 Indian Penal Code and sentenced to six months' rigorous imprisonment. He was tried with one Abdul Rajak for offences under sections 324, 323 and 325 Indian Penal Code. The jury unanimously found Abdul Rajak not guilty and found the appellant guilty under section 324 Indian Penal Code.

On behalf of the appellant three points have been taken by the learned vakil who appears for him relating to non-direction in the learned Judge's charge to the jury. The first point is with regard to the admissibility of the depositions taken by the Magistrate. What happened in this case is that the case for the prosecution rested on the evidence of two alleged eye-witnesses to the occurrence Nawabuddin and Wasiuddin and of another witness Madhu a servant of the family, who had lodged the first information on hearing about the occurrence from one of the other witnesses. Before the committing Magistrate they spoke of having seen the occurrence or part of it but in the Sessions Court they practically denied having seen it. Nawabuddin had said before the committing Magistrate that there was an exchange of abuse. Gani Mia (accused) then began to cut Abdul Jabbar with his sword and Kalarbap (Abdul Rajak) beat Abdul Jabbar on the head. Abdul

(1) (1874) 21 W. R. Cr. 49.

Jabbar fell down and was beaten further. In the Sessions Court he said that Abdul Gain gave a stab to Abdul Jabbar with a sword but he could not say where it landed, and Abdul Jabbar struck Abdul Gani a blow with a pointed *lathi*. On being questioned by the learned Judge as to whether he was right as to the statement he was making he answered 'I did not see'. Wasiuddin had stated before the committing Magistrate thus: "I heard a cry and went upon the courtyard. I found Abdul Jabbar and Nawabuddin lying on the courtyard in front of Mamudjan's hut. There were many injuries on their persons. Abdul Razak had a *lathi*, Abdul Gani had a weapon made of iron which is called *takwar*." In the Sessions Court he said as follows: "I heard a shriek, not the words. I saw Nawabuddin and Jabbar lying in the yard. Razak, Gani and Karim were there. I did not clearly notice what was in their hands but Gani had something in his hand." The servant Madhu had stated before the Magistrate that he saw the accused going out of Mamudjan's hut with a sword and he saw Abdul Jabbar lying unconscious in his hut. He was asked by Mamudjan to go to the Thana and to lodge *ejahar* there and he did according to instruction. In the Sessions Court he had said "I saw nothing in their hands. Then I went in Jabbar Mia's hut and found Jabbar lying. Nawab told me to go to Thana. He told me what to say." From the depositions of these witnesses before the committing Magistrate and in the Sessions Court, it is clear that they were deliberately attempting to retract the evidence given by them before the committing Magistrate. The learned Sessions Judge admitted their evidence before the committing Magistrate under section 288 Criminal Procedure Code and placed it before the jury who apparently based their verdict upon it.

It is contended on behalf of the appellant that the evidence before the committing Magistrate which was received by the learned Judge under section 288 Criminal Procedure Code was not admissible under that section. It is pointed out that the Magistrate originally started the case with a view to try it himself but at a later stage decided to commit it to the Sessions; the evidence in this case was therefore not recorded under Chapter XVIII. Section 288 as amended by the Act of 1923 stands thus: "The evidence of a witness, duly recorded in the presence of the accused under chapter XVIII, may, in the discretion of the presiding Judge, if such witness is produced and examined be treated as evidence in the case, for all purposes subject to the provisions of the Indian Evidence Act, 1872." The

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words "duly recorded in the presence of the accused under Chapter XVIII" have been substituted by the Act of 1923 for the words, "duly taken in the presence of the accused before the committing Magistrate" and it is argued that the evidence in this case was not recorded by the Magistrate under Chapter XVIII and therefore it should not have been admitted by the learned Judge under Sec. 288 Criminal Procedure Code. This contention has no substance. The amendment of the section by substituting the words 'duly recorded in the presence of the accused under Chapter XVIII' for the words "duly taken in the presence of the accused before the committing Magistrate" is intended to cover cases where evidence may be recorded by the committing Magistrate but not for the purpose of commitment, as under Sec. 219 Criminal Procedure Code. Besides, there is no special procedure laid down in Chapter XVIII for recording evidence and any evidence recorded by a Magistrate before commitment whether recorded with a view to commitment or in the ordinary course of trial is evidence recorded in the presence of the accused under Chapter XVIII.

The next ground raised by the appellant requires careful consideration. As I have already observed the conviction of the accused rests upon the evidence of three persons, who spoke of the occurrence before the committing Magistrate but who in the Sessions Court declared that they knew nothing about it. The basis of the verdict of the jury therefore in this case is the evidence of those witnesses recorded by the committing Magistrate and admitted by the Judge under Sec. 288. It is argued that the conviction based solely upon evidence admitted under Sec. 288 is wrong and that the learned Judge should have directed the jury that on the evidence as it stood in the trial there could be no conviction at all. It is necessary to note that there has been a substantial alteration in Sec. 288 by Act XVIII of 1923. The words "for all purposes subject to the provisions of the Indian Evidence Act, 1872" have been added after the words "be treated as evidence in the case". Several decisions have been placed before us in support of the appellant's contention. In the case of *Queen v. Amanullah* (1) it has been held that a conviction should not be based solely upon evidence admitted under section 288 Criminal Procedure Code unless there is sufficient corroboration by other evidence. So far as this Court is concerned this case was followed in the case of *Queen Empress v. Jadub Das* (2). The case in the Weekly Reporter was a case in which the High Court had to confirm the sentence

(1) (1874) 21 W. R. Cr. 49.

(2) (1893) I. L. R. 27 Calc. 295

of death passed on the accused and therefore it had to go into the evidence to find out if the sentence could be upheld. The case of *Queen Empress v. Jadub Das* (1) was a reference under Sec. 307 Criminal Procedure Code and the Court had to look to the evidence to find if the verdict of the jury could be upheld. In the case of *Queen-Empress v. Nirmal Das* (2) the same view has been expressed. It does not appear that the trial in that case was held with the aid of a jury. It would seem that the appeal was from the order of the Sessions Judge who acquitted some of the accused and convicted the appellant. These cases and others bearing on the point have been considered in a very recent case decided by the Patna High Court, namely the case of *King Emperor v. Jehal Teli* (3). Mr. Justice Bucknill in an elaborate judgment in which almost all the cases on this point were reviewed made the following observation on the conclusion reached by him. "I think, therefore, that the principle is quite clearly settled by this line of cases that unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilized in support of a conviction. This case was decided in 1924 and after the amendment of the section by the Act of 1923. I may add that this case was a reference under section 374 Criminal Procedure Code. The Allahabad High Court in a case decided under the old Code had struck a somewhat dissentient note. In the case of *Emperor v. Dwarka Kurmi* (4), Mr. Justice Aikman quoted with approval the observation of Plowden J. in *Umar v. Empress* (5) which was to the effect that once the evidence is admitted under section 288 it is on the same footing with all other evidence in the case, that is to say, "it is to be considered by the jury or by the assessors and the Judge, according to the nature of the trial, as part of the materials upon which the verdict or a finding is to be given. Whether any portion or the whole of the evidence thus admitted is entitled to credit, and if so, to such a decree that a conviction may be based upon it wholly or in part, are very important questions for the jury or assessors, or for the Judge, as the case may be, but they are in no way affected by the section." I am of opinion that the view thus expressed is correct. Section 288 at any rate as it stands now, makes the evidence recorded by the

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(1) (1899) I. L. R. 27 Calc. 295.

(2) (1900) I. L. R. 22 All. 445.

(3) I. L. R. 3 Patna 781.

(4) (1906) I. L. R. 28 All. 683.

(5) (1887) 22 Panj. Rec. Cr. J. 132.

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Magistrate admissible at the discretion of the trying Judge and it further enacts that it is to be treated as evidence in the case "for all purposes subject to the provisions of the Indian Evidence Act." The only case decided after this amendment is, as I have observed, the case of *King Emperor v. Jehal Teli* (1). But there the learned Judges did not consider the effect of the addition of the words "for all purposes" to the section. They rightly decided the point strenuously pressed on their attention as to the meaning of the words "subject to the provisions of the Indian Evidence Act," holding that such deposition can be used as evidence so long as the evidence is an evidence within the meaning of the Indian Evidence Act; or, in other words, that the evidence may be used for all purposes if it is admissible under the Indian Evidence Act. As to the important question as to how far it is possible to have a conviction upon evidence before a Magistrate when the evidence given at the trial differs from it and is exculpatory of the accused, the learned Judge has considered all the cases which were decided under the section as it stood before the amendment and has endorsed without further consideration the decision in those cases in the words which I have already quoted. That decision therefore is of no help to us because the significance of the addition of the words "for all purposes" was not considered in it. The section before the amendment said that 'such deposition is to be treated as evidence in the case.' The addition of the words 'for all purposes' must be with set design and for the purpose of attaining a definite object. It seems to me that these words have been added to remove the limitation to the value of that evidence as fixed by the cases referred to above. Under the present section it must be held that the evidence recorded by the committing Magistrate if admitted under section 288 must be treated as evidence for all purposes even as the basis of finding or verdict and on a par with any other evidence before the Sessions Court or as a substantive evidence on which the verdict of the jury or judgment of the Judge can be based.

The third point taken by the learned vakil for the appellant is, that in the circumstances of this particular case the Judge should have told the jury not to take the evidence of witnesses who have retracted their statements before the committing Magistrate into consideration and that it is not safe to rely upon a portion of their evidence as true and reject another portion as false; and for this view reliance has been placed on the case of *Emperor v. Satyendra Kumar Dutt Chowdhury* (2). That case was a jury Reference in

(1) I. L. R. 3 Patna 781.

(2) (1922) 37 C. L. J. 173.

which the learned Judges had to consider whether the verdict of the jury could be supported on such evidence. It is dangerous to lay down as a general rule of law that in this country it is not proper to believe the evidence of a certain witness in part. Be that as it may, in my opinion the learned Judge's charge is not quite free from this blemish. The witnesses who have retracted their statements before the committing Magistrate are no doubt lying witnesses and they must have spoken falsehood either before the committing Magistrate or in the Sessions Court. The learned Judge ought to have told the jury that they should be looked upon as witnesses who are not above suspicion and those evidence should be regarded with great caution. The jurors ordinarily are not men who are used to weighing evidence and it is therefore necessary that all help should be given to them in estimating the evidence in the light of the observations made by learned Judges in decided cases. Instead of doing that the learned Judge has expressed his opinion with a certain degree of assertion in these words : "It seems clear to me that these persons have decided to go as far as they possibly can towards altering their evidence in such a way as shall secure the acquittal of the two men here on trial." This is a suggestion to the jury that the witnesses were speaking the truth when they were deposing before the committing Magistrate but that before him they were attempting to screen the offender. Though the learned Judge has stated in his charge "it is for you to say whether you feel convinced as to the truth of the three Magisterial depositions to an extent which would warrant you as prudent men in acting upon them." I do not think that it can be said that the jury were left with the option of accepting the evidence given before the committing Magistrate or that given in the Court of Sessions. In this view I hold that the charge is vitiated by the defect pointed out.

It next remains to consider whether it is a fit case in which we should order a retrial. The whole of the evidence has been placed before us and we do not think that it is so strong as to lead us to hold that a retrial would be in the interest of public justice. We accordingly set aside the conviction of and the sentence passed upon the accused and order that he be acquitted and discharged from his bail bond.

Panton J : I agree.

A. T. M.

Appeal allowed : Conviction set aside.

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Before Mr. Justice Suhrawardy and Mr. Justice Panton.

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July, 8.

KABATULLA AND OTHERS

v.

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Misdirection—Possession of stolen goods by accused—Explanation as to possession—Presumption.

In a case where the evidence of guilt of the accused rests upon discovery of stolen property from his possession and which is tried by jury, the proper course is to direct that the jury are entitled to take into consideration the explanation offered by the accused of their possession. It is not necessary that such claim by the accused must be proved. If he states the circumstances under which he obtained it, the jury may accept it, and in that case it will be their duty to acquit the accused: *Hathim v. King-Emperor* (1) followed.

Where a Judge in his charge to the jury insists that, if the prosecution succeeds in proving possession by the accused of recently stolen goods, it is the duty of the accused to prove his innocence and emphasizes it by explaining that mere allegation is not proof and that the presumption raised under the law cannot be rebutted by mere denial:

Held, that the explanation of the law is not correct and amounts to a misdirection which vitiates the charge: *Satya v. Emperor* (2).

Appeal under section 410 of the Code of Criminal Procedure by the Accused.

The appellants were convicted under section 395 Indian Penal Code and sentenced to 7 years' rigorous imprisonment each.

The facts were sufficiently stated in the judgment. None of the dacoits was recognised by the inmates of the house of the complainant. The charge against the present accused depended on the finding of certain property.

Babu Jatindra Mohan Chowdhury for the Appellants.

Mr. Khundkar (Deputy Legal Remembrancer) for the Crown.

July, 8.

The judgment of the Court was as follows:

This appeal is by three appellants who have been convicted under section 395 Indian Penal Code and sentenced to 7 years' rigorous imprisonment each, with the direction under section 565 Criminal Procedure Code to notify the address to the police

*Criminal Appeal No. 188 of 1925, against the order of B. K. Basu Esq, Sessions Judge of Malda, dated the 11th January, 1925.

(1) (1920) 31 C. L. J. 310; 24 C. W. N. 619. (2) I. L. R. 52 Calc. 223.

in case of accused No. 1. Four jurors found the accused guilty under section 395 while the 5th juror found them guilty under section 412 Indian Penal Code. The learned Judge has accepted the verdict of the majority of the jury and convicted and sentenced the accused as aforesaid. In appeal several grounds have been taken pointing to the misdirections alleged to have vitiated the learned Judge's charge to the jury. It is enough for our present purpose to refer to only one of them. The evidence, it appears, rested mainly upon the recovery of the stolen articles from the possession of the accused. With regard to the explanation of the law on this head the learned Judge made the following observation: "The law regarding finding of property is this, that if stolen or dacoited property is found in possession of any person soon after the commission of the theft or dacoity, you may presume him to be either the thief or dacoit or a receiver unless he accounts for possession." Then he proceeds to state the three necessary elements which give rise to the presumption under the law namely (a) that the property was found in possession of the accused; (b) that the property is stolen property and (c) that it was found soon after the theft or dacoity. Then the learned Judge adds that if these three conditions are satisfied you may presume against the accused until he proves his innocence, otherwise not. As to what is meant by the learned Judge by the word 'proved', in a subsequent part of his judgment he says "if you are satisfied that the presumption can be made you will see how far the presumption has been rebutted. As to the claim of the articles, allegation is not the same as proof. But if you make the presumption; it cannot be rebutted by mere denial." Reading these passages together it is evident that what the learned Judge meant to hold and which the jury understood is that if the articles are stolen properties and were found in possession of the accused it is sufficient to prove that they were thieves or dacoits and the rebuttable presumption that arises in law is that the accused are either thieves or dacoits until they succeed by adducing sufficient proof in establishing their innocence. This direction has been considered to be serious misdirection in several cases decided by this Court. In *Hathim Mondal v. King-Emperor* (1) the learned Chief Justice quoted a portion of the judgment of the learned Chief Justice of England in the case of *R. v. Isaac Schama* (2) where it is said that in a case like the present the charge to the jury should be to this effect: "Where the

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(1) (1920) 31 C. L. J. 310; 24 C. W. N. 619.

(2) (1914) 11 Cr. App. Rep. 45 (49)

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prisoner is charged with having recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury may be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal because the Crown has not discharged the *onus* of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That *onus* never changes; it always rests on the prosecution." In a case where the evidence of the guilt of the accused rests upon discovery of stolen property from his possession and which is tried by the jury the proper course is to direct that the jury are entitled to take the explanation offered by the accused of their possession. It is not necessary that such claim by the accused must be *proved*. There may be a case in which it is impossible for the person who is in possession of the property to prove how he obtained possession of it and if he states the circumstances under which he obtained it the jury as a Court of fact may accept it; and in that case it will be their duty to acquit the accused. The statement of the law made by the learned Judge in his charge to the jury leaves no such option to the jury. He insists that, if the prosecution succeeds in proving possession by the accused of recently stolen goods, it is his duty to prove his innocence and he emphasises it by explaining that mere allegation is not proof and that the presumption raised under the law cannot be rebutted by mere denial. We think that this explanation of the law is not correct and amounts to a misdirection which vitiates the charge. This view is in accord with that taken in *Satya Charan Manna v. Emperor* (1). Though there is difference in the language of the charge under consideration in that case from that in the present case the law as laid down there is equally applicable to the present case. We are accordingly of opinion that this charge is vitiated by the misdirection referred to and that the trial must be held to be not according to law. There are other objections taken but it is not necessary to consider them. In the view above stated the conviction of and the sentences passed upon the appellants must be set aside.

(1) (1924) 1. L. R. 52 Calc. 223.

We accordingly order that the conviction of and the sentences passed upon them be set aside and that they be retried according to law.

They will remain in jail until further orders by the trying Court.

A. T. M.

Appeal allowed : Retrial ordered.

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Before Mr. Justice Suhrawardy and Mr. Justice Panton.

AHMED ALI AND OTHERS

v.

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July, 7, 8.

Forgery—Inference—Use of false document—Penal Code (Act XLV of 1860), Sec. 463—‘Intent to defraud’—Attesting witness, signature of, effect of—Knowledge of contents of document.

The purpose with which a false document might have been prepared, is a matter of inference.

The inference that the intention was that the false document should be used in a judicial proceeding, even though such a proceeding is not in fact instituted, is a reasonable one.

The signature of an attesting witness does not fix that witness with knowledge of the contents of the document or with any liability under its terms.

“The expression ‘intent to defraud’ in section 463 Indian Penal Code implies conduct coupled with intention to deceive and thereby to injure; in other words ‘defraud’ involves two conceptions, namely, deceit and injury to the person deceived, that is, infringement of some legal right possessed by him but not necessarily deprivation of property”: *Surendra v. The Emperor* (1).

Appeal under section 410 of the Code of Criminal Procedure by the Accused.

The material facts appear from the judgment.

Babu Santosh Kumar Bose for the Appellants.

Babu Probodh Chandra Kar for the Complainant.

*Criminal Appeal No. 96 of 1925, against the order of T. M. Dow, Sessions Judge of Noakhali, dated the 13th January, 1925.

(1) (1910) 14 C. W. N. 1076 (1085).

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Mr. Khundkar (Deputy Legal Remembrancer) for the Crown.

C. A. V.

The judgment of the Court was as follows :

The present appellants have been convicted on the unanimous verdict of the jury—the appellant No. 1 Ahmed Ali under sections 193 and 467 Indian Penal Code—appellant No. 2 Sayadutulla Khan under section 193 read with section 109 and under section 467 Indian Penal Code and appellant No. 3 Yusuf under section 193 read with section 109 and section 467 read with section 109. They have been sentenced under the earlier of these sections to rigorous imprisonment for three years and under the latter section to rigorous imprisonment for 5 years, the sentences running concurrently. I may observe that the jury returned also an alternative verdict of guilty under sections 465, 465, 465 respectively against these appellants. The case against them was that they were concerned in the preparation of a certain *borga kabulyat* which recites that the appellant Ahmed took a sub-lease from the appellant Yusuf of certain land which Yusuf, according to the recital, held under the landlord Joy Gobind Chowdhury. This document was presented for registration with the signature as an attesting witness of one Chittaranjan Chowdhury. The case for the prosecution was that none of the appellants had any title to the land and that the signature of Chittaranjan Chowdhury was a forgery.

Three main points have been urged against the charge delivered by the learned Judge to the jury. The first is that he has wrongly explained to the jury the law in respect to all the offences charged. In the second place, it is said that he has not sufficiently directed them as to the defence set up by the appellants ; and in the third place, it is said that he has adopted a wrong method in placing long extracts from the depositions of the witnesses before the jury.

Now as regards the second of these points, we do not consider that it is of very great importance having regard to the view which we take as to the convictions under chapter XVIII of the Indian Penal Code. As regards the third point, I may say that the learned Judge might have adopted a better method of putting new evidence before the jury, and he might have arranged the matter with greater skill ; but at the same time it is impossible to say that because he adopted the method which he did adopt, the jury was in any manner misled in consequence.

The real objection to the learned Judge's charge is the first to which I have referred, namely, the misdirection which is said to

have been given to the jury on the subject of the law applicable to the particular charges.

As regards the charge under section 193 Indian Penal Code, it is urged that the material is insufficient to justify a finding that this document was prepared for the purpose of being used in any stage of a judicial proceeding. The purpose with which the document might have been prepared is a matter of inference and in dealing with this part of the case the learned Judge told the jury that they would have to consider Ahamed Ali's intention in making in the *Kabulyat* this false statement viz "that you are the owner in possession," and he went on to say "you will ask yourself what is the natural intention of the offender who manufactures a false document with regard to land"; and he finally leaves it to the jury to decide what that intention was. It seems to us that the inference that the intention was that the document in question should be used in a judicial proceeding even though such a proceeding had not in fact been instituted is a reasonable one; and that the verdict arrived at by the jury in this respect is justifiable.

It is in respect to the direction given by the learned Judge as to the offences under Chapter XVIII Indian Penal Code, that, in our opinion the learned Judge has fallen into error. But it is not necessary in view of our opinion as to the conviction under section 193 and our view as to the punishment inflicted, that I should do more than very shortly admit to the learned Judge's charge in this respect. It seems to us that on the two subjects the learned Judge has gravely misdirected the jury. In explaining section 467 Indian Penal Code he said: "Here the injury would be the deprivation of Chittaranjan of the right in land to which prosecution asserts he is entitled." Then again when he was discussing the meaning of the expression valuable security he says in respect to the signature of Chittaranjan that it "purports to be an acknowledgment that he accepts the *kabulyat* and the proposals made therein. His signature, when joined to the forged *kabulyat* purports to be an acknowledgment that he has not a certain legal right." That is distinctly wrong because the signature of an attesting witness does not fix that witness with knowledge of the contents of the document or with any liability under its terms. The learned Judge has fallen into a second error in discussing section 463 Indian Penal Code. He says "But the forging of the signature may be regarded as fraudulent i.e. with intent to deceive since if the forged signature ever appeared before a Court it would deceive the Court and lead it to believe that the title of Ahamed or Yusuf was

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acknowledged by the over-landlord Chittaranjan which was not the case." That is not a correct explanation of the words as it occurs in section 463. In this respect it is only necessary to refer to the observation of Mr. Justice Mookerjee in the case of *Surendra Nath Ghosh v. The Emperor* (1) which occurs at page 1085. The learned Judge there says "The expression 'intent to defraud' as it occurs in section 463 Indian Penal Code implies conduct coupled with intention to deceive and thereby to injure; in other words 'defraud' involves two conceptions, namely, deceit and injury, to the person deceived that is infringement of some legal right possessed by him but not necessarily deprivation of property" Having regard to this observation it is clear that the learned Sessions Judge did not properly explain to the jury the bearing of the word 'defraud' upon the point at issue. For this reason we think that the conviction of offences under Chapter XVIII of the Indian Penal Code cannot be supported.

It has been argued however that the evidence does establish facts which in other respects would justify the conviction under this Chapter of the Indian Penal Code. We do not, however, think it necessary to go into this matter or to express any opinion upon it, because, as I have just now said, the conviction under section 193 Indian Penal Code is a good conviction and the punishment inflicted under it is in our judgment adequate. We, therefore, set aside the conviction, under section 463 and confirm those under section 193 and section 193 read with 109.

The punishment that has been inflicted under these latter sections is 3 years' rigorous imprisonment. We have taken into consideration, however, the nature of the document in question. We think that it was not a very dangerous document and that we can safely reduce to 2 years' rigorous imprisonment which we accordingly do.

A. T. M.

Appeal allowed in part: Sentence reduced.

(1) (1910) 14 C. W. N. 1076 (1085).

CIVIL RULE.

Before Sir Babington Bennett Newbould, Knight, Judge.

KAMINI KUMAR ROY AND ANOTHER

v.

RAJENDRA NATH ROY AND ANOTHER.*

CIVIL.

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July, 15.

Suit, withdrawal of—Bringing fresh suit, not granted—Objection, if to be express—Procedure.

Where the plaintiff does not desire to withdraw from the suit unless with liberty to bring a fresh suit, and the Court considers that such liberty should not be granted, the proper course is simply to dismiss the application: *Mahant Bihariadasji v. Farshotamdas* (1). It is not necessary for the plaintiff to expressly take such objection before his application is rejected.

Application under section 115 of the Code of Civil Procedure and section 107 of Government of India Act by the Plaintiffs.

Suit for possession of land on the allegation that the plaintiffs were wrongfully dispossessed from the same by the defendants.

After some witnesses for the plaintiffs were examined, it was found that there was a formal defect. An application was then filed for permission to withdraw the suit with leave to institute a fresh suit on the same cause of action. The Court granted leave to withdraw the suit but refused permission to have leave to institute a fresh suit.

Babu Rupendra Kumar Mitter for the Petitioners.

Mr. Gunada Charan Sen and *Babu Someswar Prosad Mukherjee* for the Opposite Party.

The following judgment was delivered by

Newbould J : The plaintiffs petitioners during the hearing of their suit No. 69 of 1924 in the Court of the second Munsiff of Chikandi applied for permission to withdraw from the suit with liberty to bring a fresh suit. The Munsiff allowed them to withdraw from the suit without permission to bring a fresh suit and directed the defendants do get their costs from the plaintiff. This order was passed

July, 13.

*Civil Rule No. 552 of 1925, against the order of Babu N. N. De, 2nd Munsiff of Chikandi, dated the 20th February, 1925.

(1) (1908) 1 L. R. 32 Bom. 345.

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Nembould, J.

in connection with two suits, but in this Rule we are only concerned with suit 69 of 1924.

That the Munsiff's order was wrong is clear from the decision of the Bombay High Court, in *Mahant Bihari Dasji Guru Govind Dasji v. Parsho Amdas Ramdas* (1). As there pointed out, where the plaintiff does not desire to withdraw from the suit unless with liberty to bring a fresh suit, and the Court considers that such liberty should not be granted the proper course is simply to dismiss the application. On behalf of the opposite party in this Rule the same argument was urged as had been urged at the hearing of the case cited.

It was contended that the permission having been refused without any objection on the part of the plaintiff he must be deemed to have withdrawn from the suit. It was not necessary for him to expressly take such objection before his application was refused. The Rule is accordingly made absolute with costs and the order passed by the Munsiff will be varied by substituting therefor an order in these terms. The application for permission to withdraw from the suit, with liberty to bring a fresh suit for the subject matter of the suit is dismissed with costs. The result will be that the case must be restored to the file.

I assess the hearing fee at two gold mohurs.

A. T. M.

Rule made absolute.

(1) (1908) I. L. R. 32 Bom. 345.

APPELLATE CIVIL.

*Before Sir Ewart Greaves, Knight, Judge, and Mr. Justice
B. B. Ghose.*

NEPALDAS MUKHERJEE

v.

PROBHAS CHANDRA MUKHERJEE AND OTHERS.*

CIVIL.

1925.

July, 9.

*Inheritance—Bengal School.—Daughter's son's son—Spiritual benefit—Near-
ness of Kin—Ejectment, suit for—Title to be proved.*

Unless a person is in a position to confer spiritual benefit on the owner of the property whose property he claims, he is not and cannot be an heir of such a person and cannot therefore claim to inherit such property : *Gooroo Gobind v. Anund Lall* (1) and *Digumber v. Moti* (2).

Daughter's son's son is not an heir according to Bengal school. Even if there be no one alive who can confer spiritual benefit he cannot inherit on the ground of his propinquity to the original owner of the property.

A person suing in ejectment must establish his title.

Appeal by Defendant No. 6.

Suit for declaration of title and for possession of land.

The material facts appear from the judgment.

Dr. Jadu Nath Kanjilal, and Babu Surendra Nath Das Gupta
No. 2 for the Appellant.

*Babus Suresh Chandra Talukdar and Nibaran Chandra Samaj-
paty* for the Respondents.

The judgment of the Court was as follows :

This is an appeal by defendant No. 6 from a decision of the Subordinate Judge of the 2nd Court of Faridpur reversing a decision of the Munsiff of the 3rd Court of Bhanga. The suit was brought by the plaintiffs for declaration of their title to and for possession of a certain plot of *niskar* land, plot No. 137 of the cadastral survey which was in estate No. 1187. Some question was raised in the Courts below as to whether the property in dispute was *niskar* or *mal* land of the estate but it has been found that the

July, 9

*Appeal from Appellate Decree No. 1285 of 1923, against the decree of Babu Nirode Ranjan Guha, Subordinate Judge of Faridpur, dated the 24th January, 1923, reversing that of Babu Dharendra Nath Bagchi, Munsiff, 3rd Court, at Bhanga, dated the 5th April, 1922.

(1) (1870) 13 W. R. F. B. 42 (59) ; 5 B. L. R. 15.

(2) (1883) 1 L. R. 9 Calc. 563 (567).

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property is *niskar* and this is not questioned in second appeal. The plots originally belonged to one Raghumani Banerji. He died leaving a daughter Dakhina who had a son Purno. Purno died leaving him surviving three sons who are the plaintiffs in the present suit. Their case was that Dakhina succeeded to the property on the death of Raghumani and that on Dakhina's death the property passed to her son Purno and on his death to his sons the present plaintiffs. Their case was that they had been in possession through their *bhag tenants* and that they have been dispossessed. The defendants or some of them were owners of the estate No. 1187. As we have already stated they claim the land as *mal* land of the estate. The case was only contested by defendant No. 6 who had purchased the land from the other defendants. Although the plaintiffs' case was that Purno had inherited after his mother, they had inherited from him, it turned out in the course of the case that Purno predeceased his mother Dakhina. The suit was dismissed by the first Court but the lower appellate Court allowed the plaintiffs to raise what is said to be a fresh case, namely, that although Purno predeceased his mother, Dakhina, the plaintiffs inherited the property as Dakhina's heirs.

The only question that arises in this appeal is whether under the facts and circumstances stated, namely, that Purno predeceased his mother, the plaintiffs are entitled to claim the property as heirs of Raghumani. The lower appellate Court has held that they were entitled and this is the proposition which is disputed before us. It is stated that in no case can the grandsons of a daughter inherit the property as they cannot confer spiritual benefit on the original owner Raghumani and that the power to confer spiritual benefit is the only test of inheritance. In support of this proposition we were referred, first of all, to a passage in Mayne's Hindu Law (8th edition) page 706, section 505 and also to a passage in Trevelyan's Hindu Law (2nd edition) page 410 where the learned author states that the daughter's son's son is not an heir according to the Bengal School. Then we were referred to the actual test of the Dayabhaga in the translation by Colebrook Chapter 11, section 2, verse (ii) at page 159 where it is stated as follows: "It is the daughter's son who is the giver of a funeral oblation, not his son, nor the daughter's daughter for the funeral oblation ceases with him" and in the analysis at p. IX it is stated that "in default of the widow the daughters inherit." The daughter that is barren or a sonless widow or female children, hence daughter's daughter and daughter's son's son are not heirs being incompetent to confer spiritual benefit; and

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in support of the proposition that inheritance depends on the power to confer spiritual benefit and on this alone we were referred to the Full Bench Case of *Gooroo Gobind Shaha v. Anund Lall Ghose* (1) The passage relied on in the judgment of Mr. Justice Mitter is to the following effect : " Having shown by the preceding observations that the principle of spiritual benefit is the sole foundation of the theory of inheritance propounded in the Dayabhaga, we proceed to determine whether the particular claimant before us, namely, the son of a paternal uncle's daughter is competent to confer any such benefit on the deceased proprietor. We are of opinion that he is, and we may add that this point was not even contested before us by the pleader for the respondent." We think, therefore, that this passage clearly lays down the principle that the foundation of the theory of inheritance as propounded in the Dayabhaga proceeds on the doctrine that only those can inherit who can confer spiritual benefit on the owner whose property they claim to inherit. Similar authority is to be found in another Full Bench case of this Court in *Digumber Roy Chowdhry v. Moti Lal Bundopadhyaya* (2) the material passages in this judgment on this point being those occurring at page 567. There is no doubt as has been pointed out by a reference to the text books and to passages in the case to which we have referred that from time to time attempts had been made to throw doubt on the proposition laid down in the passage to which we have referred in *Gooroo Gobind v. Anund Lall* (1) but the attempts that had been made to re-open the question have always failed on the ground that the Courts have stated that that principle must be taken as decided by the passage to which we have referred in the case which is a decision which has stood for 50 years. But it is argued on behalf of the respondents that even accepting this principle as there is no one alive who can confer spiritual benefit, the grandsons of a daughter may be entitled to inherit on the ground of their propinquity to the original owner of the property in default of the existence of persons who can confer such spiritual benefit. In support of this proposition we were referred to the case of *Radharaman Chowdhuri v. Gopal Chandra Chakravarty* (3). The cases to which we have referred are there considered and the argument that was propounded to the Court based on the right of persons standing in propinquity to the original owner to inherit in default of the existence of persons who can confer spiritual benefit was discussed.

(1) (1870) 13 W. R. F. B. 49 (59).

(2) (1883) I. L. R. 9 Calc. 563.

(3) (1919) 31 C. L. J. 81.

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But in the result no decision was arrived at by the Court on the application which was merely an application to appear and contest certain probate proceedings. We do not think therefore that the learned vakil who appeared for the respondents is entitled to rely on anything that occurs in 31 Calcutta Law Journal in support of his argument for as we have already stated we do not think that any decision was come to there. In my view the passages to which we have referred in the two Full Bench cases lay down clearly that unless a person is in a position to confer spiritual benefit on the owner of the property whose property he claims, he is not and cannot be an heir of such a person and cannot therefore claim to inherit such property.

This being so, we think that the appeal must succeed on this ground, namely, that the respondents here who succeeded in the Courts below are not heirs of Raghumani and have, therefore, no interest in the property which they claim. They were suing in ejectment and it was for them to establish their title. This they have failed to do and the appeal accordingly succeeds and with costs in all Courts.

A. T. M.

Appeal allowed.

CIVIL RULE.

Before Mr. Justice Suhravardy and Mr. Justice Duval.

RAI RAMESH CHANDRA GUHA BAHADUR AND OTHERS.

v.

DINESH CHANDRA GUHA AND OTHERS.*

Ex parte decree—Decree, if Ex parte—Civil Procedure Code (Art. V of 1908), O. 9 R. 13, O. 17 R. 3—Order that application to be considered after taking evidence—Evidence not taken for want of witness—Application for adjournment for bringing witnesses rejected—Successor of Judge, if can pass order.

A suit for accounts and declaration of title was instituted and subsequently referred to arbitration. The arbitrators submitted their award to which the defendants took objections. On the date of hearing, the petitioners applied for time for

* Civil Rule No. 495 of 1925, against the order of the Subordinate Judge, 1st Court, Dacca.

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summoning their witnesses which was refused. Thereafter the Judge pronounced judgment in accordance with the award. Subsequently the petitioners filed an application under order 9 rule 13 of the Code of Civil Procedure for setting aside the decree. On this application the Court passed the order that it should be considered after taking the evidence of the parties. The only objection taken at that stage was that it did not disclose sufficient grounds under order 9 rule 13. A supplementary affidavit was filed by the petitioner and the Judge accepted it as curing the defect :

Held, that the decree on the face of it *inter partes* could not be treated as *ex parte*.

That, as in the present case the decree did not purport to be *ex parte*, an application under order 9 rule 13 was not maintainable.

That by the order of the Judge accepting the affidavit as curing the defect, his successor was not precluded from going into the propriety of the application.

Application under section 115 of the Code of Civil Procedure by the Defendants.

Application to set aside an alleged *ex parte* decree.

The material facts appear from the judgment.

Dr. Sarat Chandra Basak and *Babu Jitendra Kumar Sen Gupta* for the Petitioner.

Dr. Naresh Chandra Sen Gupta, *Babus Bimala Charan Das* and *Surendra Lal Mukherjee* for the Opposite Party.

The judgment of the Court was as follows :

This Rule is directed against an order of the Subordinate Judge of Dacca, dated the 6th February 1925, by which the learned Subordinate Judge held that the application by the petitioners under order 9 rule 13 Civil Procedure Code could not be maintained. The facts are that a suit for accounts and declaration of title was instituted and subsequently referred to the arbitration of three arbitrators. The arbitrators submitted their award to which the defendants took several objections. On the date of hearing the petitioners applied for time for summoning their witnesses which was refused. Thereafter the Court pronounced judgment in accordance with the award. Subsequently the petitioners filed an application under order 9 rule 13 which has been rejected on the ground that it is not maintainable. Two objections have been taken against this order. In the first place it is argued that the order of the Court below is wrong inasmuch as the order decreeing the suit was an order passed under order 17 rule 2 and therefore an application under order 9 rule 13 would lie. With reference to this objection it appears from an examination of the record that

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an application was made on behalf of the petitioners for summoning his witnesses. The learned Subordinate Judge passed the following order :—"The defendant No. 1 has filed a petition for summons to his witnesses. Heard pleader for defendant No. 1, petition will be considered in judgment." In the judgment that was passed, the learned Judge stated as follows :—"The objections were filed by the defendant on 28. 2. 24 in suit No. 274 of 1922. Since then he has been allowed sufficient time to bring his witnesses and adduce evidence. On a perusal of his objections I find that they are very vague. At this stage the defendants filed a petition for time to bring witnesses. I reject this application on the ground that it is made to harass the opposite party. I therefore affirm the award in both cases." The decree that was drawn up in pursuance of the judgment mentioned the names of the several pleaders for the defendant in whose presence it was passed. There is nothing in the record to show that the pleader who applied for time had no further instructions to appear and so the decree was passed *ex parte*. A decree on the face of it inter parties cannot be treated as *ex parte*. The decree does not purport to be *ex parte* ; the present application does not accordingly lie.

Besides it cannot be said that it is an order passed under order 17 rule 3. That rule provides that if a party is allowed time to produce his witnesses and fails to do so, the Court will proceed to decide the suit forthwith. It is argued that this rule applies only to cases where there are materials before the Court upon which to decide the suit. In this case it cannot be said that there were no materials before the Court as the award was before the Court and on it a decision could be passed. Moreover the rule says that if the party does not appear the Court will proceed to decide the suit. It is open to question if it refers to interlocutory proceedings such as one under order 9 rule 13. In this view we think that the order of the Court below is correct.

The second objection taken is that on the application under order 9 rule 13 the Court passed the order that it should be considered after taking the evidence of the parties. It is contended that the successor of the Judge who passed the order was not entitled to override the order of his predecessor. It appears that the application under order 9 rule 13 was made before Mr. Biswas. The only objection taken at that stage was that it did not disclose sufficient grounds under order 9 rule 13. A supplementary affidavit was filed by the petitioner and the Judge accepted it as curing the defect but it is not decided by that order whether order 9 rule

13 applies to the case at all. We therefore think that this successor was not precluded from going into the propriety of the application.

In this view the Rule is discharged with costs three gold mohurs.

A. T. M.

Rule discharged.

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PRIVY COUNCIL.

PRESENT: *Lord Phillimore, Lord Carson and Sir John Edge.*

RAJAH BHUPENDRA NARAYAN SINGH

v.

NARAPAT SINGH.

P. C.

1925.

July, 7.

Putni—Resumption of Chowkidari Chakran lands—Zamindar's right to additional rent for lands.

A putni grant by a zemindar of his interest in lands includes his interest in resumed Chaukidari Chakran lands and where the profits of the Chaukidari lands were not taken into account in determining the rent payable by the putnidar, the zemindar is entitled to have an additional rent fixed for such lands: *Pryambada v. Monahar* (1) approved. *Ranjit v. Kali Dasi* (2) and *Ranjit v. Maharaj Bahadur* (3) explained.

Appeal against a judgment and 18 decrees of the High Court at Calcutta (4) (Greaves and B. B. Ghose JJ), dated the 27th February, 1922 reversing those of the District Judge of Birbhum (P. C. De Esq), dated the 13th September, 1919, which confirmed those of the Munsiff, 1st Court, at Rampurhat (Babu Ram Dulal Deb), dated the 30th September, 1910.

The material facts appear from the judgment of their Lordships.

Sir G. Lowndes, K. C. and *Dube* for the Appellant.

De Gruyther K. C. and *R. H. Hodge* for the Respondent.

The judgment of their Lordships was delivered by

(1) (1924) 29 C. W. N. 328.

(2) (1917) L. R. 44 I. A. 117; I. L. R. 44 Calc. 841; 25 C. L. J. 499.

(3) (1918) L. R. 45 I. A. 162; I. L. R. 46 Calc. 173; 29 C. L. J. 193.

(4) (1922) 36 C. L. J. 145.

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Lord Carson : This is a consolidated appeal by special leave from one judgment and 18 decrees dated the 27th February 1922, of the High Court of Judicature at Fort William in Bengal. Each of the 18 decrees though relating to a distinct subject-matter, raises the same question for decision. Each suit was a suit to recover possession from the defendant (who is the present appellant) the zemindar of certain villages in putni settlement of Chaukidari Chakaran lands which had been resumed by the Government under the provisions of Bengal Act VI of 1870, and were transferred to the zemindar subject to the payment of rent assessed on the lands in accordance with section 51 of the Act. The plaintiffs (respondents) alleged that by a pottah dated 13th November 1853 the predecessors in title of the appellant zemindar granted five villages in putni settlement at the annual rent of Rs. 4,539, to one Krishna Chandra, from whom the plaintiffs derived title. It was further alleged by the plaintiffs and it is not now in dispute that at the time of the putni settlement there were certain lands in every village which were Chaukidari Chakaran lands, and were held and enjoyed by the Chaukidars in lieu of their salaries, and that such lands which had been transferred as aforesaid by the Collector form part of the lands of the putnidar under the said pottah of 13th November, 1853. The appellant, on the other hand, denied that under the terms of the said pottah the plaintiffs had any title to the Chaukidari Chakaran lands released by the Government and that in any event the plaintiffs were not entitled to get possession thereof without paying some rent in addition to the annual rent of Rs. 4,589 fixed in the pottah.

All the suits were tried by the Munsiff of Rampurhat, who by his judgment dated 30th September, 1910, held that the disputed property was included in putni settlement, and that the plaintiffs were entitled to obtain Khas or actual possession of the lands in suit, but that they could not do so without paying an additional rent to the zamindar, and he concluded his judgment in the following terms :—

“ The plaintiffs’ putni lease appears to cover all the lands within the boundaries of the mahals, but the profits of the Chaukidari lands were not taken into account in determining the rent payable by the putnidar. The plaintiffs must be held to pay a higher amount for the resumed lands than that which has been assessed for Chaukidari purposes on these lands by the Collector as by the resumption the lands were enfranchised and the putnidars would get the land free from the burden of the public service.

The principle has been laid down in *Hari Narain v. Mukund* (1), 'the Putnidar is bound to pay to the zamindar such a rent for these lands as corresponds to the proportion between the gross-collection and the putni rent formerly payable by him.' "

On an appeal and cross appeal to the District Judge of Birbhum the decree and order of the Munsiff was by a judgment of 13th September, 1919, affirmed. The plaintiff, now respondent, appealed to the High Court of Judicature against so much of the order as adjudged that the plaintiff should pay to the defendant No. 1 such increased putni rent over the Doult Jumma as may be proportionate to the increase of the present collection over what it had been at the time at which the putni mahal was created. The learned Judges of the High Court allowed the appeals of the plaintiff and made decree setting aside that that part of the decision of the District Judge which declared the zamindar entitled to obtain additional rents from the plaintiff, and the only question to be considered on the present appeal by the appellant zamindar against the said order is as to whether such increased rent is or is not payable. It has not been disputed, and indeed it was so stated by the judgment of the High Court that by a long series of decisions the zamindar's right to a share of the rents and profits in addition to the amount payable to the Chaukidari fund under the provisions of Act VI of 1870 was established :—

"These decisions," say the learned Judges, "have recently been considered and followed in the case of *Maharaja Beioy Chand v. Krishna* (2) which was decided in December, 1920, and no useful purpose would we think be served by going through them again. They undoubtedly do support the contention urged before us on behalf of the zamindar respondent and it is useless to suggest that they are in the main distinguishable from the cases before us."

The learned Judges, however, held that the series of decisions laying down this principle could no longer be supported having regard to the decisions of this Board in two cases viz. : (1) *Raja Ranjit Singh v. Kali Dasi Debi* (3) and *Ranjit Singh v. Maharaj Bahadur Singh* (4). Their Lordships cannot agree with the appellate Court that either of the cases referred to has the effect attributed to it by the learned Judges. In the first of these cases where it is to be observed the order was in substantially the same form as in the present case, all that this Board decided was that a putni grant by a zamindar of his interest in lands includes his interest in

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(1) (1900) 4 C. W. N. 814.

(2) (1920) 34 C. L. J. 275.

(3) (1917) L. R. 44 I. A. 117.

(4) (1918) L. R. 45 I. A. 162.

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Chaukidari Chakaran lands within the boundaries of the grant, and that upon their being resumed and transferred to the zemindar under Bengal Act VI of 1870, the patnidar or darpatnidar holding from him is entitled under s. 51 of that Act to possession. The patnidar did not in that case challenge the validity of so much of the order appealed from as rendered the decrees for possession subject to the fixing of a fair and reasonable assessment. In giving the judgment of the Board Lord Parker of Waddington added: "It is a satisfaction to find that the view above expressed is that hitherto universally adopted in the Indian Courts."

In the second of the above-mentioned cases referred to by the Judges of the appellate Court, the only point decided was that upon the transfer of Chaukidari Chakaran lands situated within the villages to the zemindar an action by the patnidars for declarations that such lands formed parcel of the patni mahal, and that they were entitled to a settlement and Khas possession was not an action for specific performance of contract within Art. 113 of Sched. II of the Indian Limitation Act, 1877, but a suit for possession of immovable property within Art. 114. Their Lordships can find nothing in the judgment in anywise affecting the point raised upon the present appeal. The Board has examined the record in that case, and it is to be observed that the order appealed from as in the former case, recognised the right of the zemindar to have a rent fixed for the Chaukadari Chakaran lands in question, and this part of the order was not questioned or appealed from in the case before the Board, and the judgment appealed from was in their Lordships opinion correct.

In a case decided by the High Court of Calcutta in 1924. *Pryambada Debi v. Monahar Mukhopadhyaya* (1) the learned Judges refused to follow the decision appealed from in the present case, holding that the appellate Court had misread or had not appreciated the two judgments of the Privy Council on which they had based their decisions. Their Lordships agree with this view, and are of opinion that the Court below was in error in holding that the cases referred to before the Privy Council made any change in the law as to the right of the zemindar to have a rent fixed under the circumstances existing in the present case. It was, however, argued in the present case before the Board that under s. 51 of Act VI of 1870, the patnidar is entitled to hold the lands rent free, or without paying additional rent for them. Their Lordships cannot accept

(1) (1924) 29 C. W. N. 328. [Decided by Suhrawardy and Cuming J].
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this view. The peculiar character of Chaukidari Chakaran lands, and how they came to be included, without paying rent, in the various putni Pottahs, as is found in the present case, has been frequently discussed before the Board, as in the cases referred to and others, and as Lord Buckmaster says in *Ranjit Singh v. Maharaj Bahadur Singh (1)* (*supra*) :—

“It does not follow that because the rights originally arose by virtue of a grant declared to be a contract within the meaning of S. 51 they are therefore rights, contractual in the sense that the contract by its terms creates and regulates the personal obligations and duties of the grantor in the circumstances that have arisen. At the time when the *putni* grants were made the resumption of the *chowkidari chakran* lands was not even contemplated, and the grant necessarily contains no reference whatever to the circumstances that would arise and the relationships that would exist in the event of the Government resuming possession.”

Their Lordships, therefore, see no reason for interfering with the long series of authorities commencing as far back as the year 1900, which have established the right of the zemindar to have an additional rent fixed for such lands, nor can their Lordships overlook the fact that in the cases already referred to before this Board no exception was taken by the putnidar to the fixing of such rents as a condition of being put into possession.

Their Lordships are therefore of opinion that this appeal should be allowed, that the decrees appealed from should be set aside, except so far as they confirm the decrees of the lower appellate Court, and that such last mentioned decrees should be restored. The respondent should pay the costs of this appeal and of the appeals in the High Court. Their Lordships will humbly advise His Majesty accordingly.

A. T. M.

Appeal allowed.

(1) (1918) L. R. 45 I. A. 162.

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FULL BENCH.

*Before Sir Hugh Walmsley, Knight, Judge, Sir Ewart
Greaves, Knight, Judge, Mr. Justice C. C.
Ghose, Mr. Justice B. B. Ghose and Mr.
Justice M. N. Mukerji.*

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June, 29.
July, 22.

KAILASH CHANDRA MITRA

v.

BROJENDRA KUMAR CHAKRAVARTI AND OTHERS.*

*Suit, maintainability of—Suit for rent against some of the heirs of the tenant—
Tenure—Defect of parties—Heirs, liability of—Tenants-in-common—Con-
tract Act (IX of 1872), Sec. 43—Bengal Tenancy Act (VIII of 1885), Sec. 88—
Civil Procedure Code (Act V of 1908), O. 1 Rr. 6, 10—Parties defendants.*

Held, by majority (C. C. Ghose and Mukerji, JJ. Contra): A suit for rent is maintainable against some of the heirs or successors in interest of a deceased tenant without bringing all the heirs or successors in interest on the record.

Per B. B. Ghose, J: Such a suit is maintainable but a decree in such a suit will not have the effect of a decree for rent under chapter XIV of the Bengal Tenancy Act.

Per Mukerji, J: The suit as framed is not maintainable without impleading as defendants all the parties who are known to be the tenants of the holding, but the suit cannot be dismissed on that ground. The Court must proceed under order 1 rule 10 (2) Civil Procedure Code to make an order for the addition of such of these persons as are not already on the record as defendants, and it is only in the event of the necessary amendments not being made that the suit is liable to be dismissed. On such amendment being made the suit should be tried out against the added defendants in accordance with law and the suit will not fail merely because the plaintiff may have lost his remedy against the added defendants.

Per B. B. Ghose, J: The heirs of a tenant do not take the tenancy as an entire body forming as it were a partnership or a corporation, the individual members of which have no definite interest. They took as tenants-in-common, each having a definite share in the whole, which he might deal with in any way he pleased.

The liability of a tenant to pay rent arises from the fact of possession of the land as a tenant where there is no express contract, and all persons in

*Full Bench Reference No. 1 of 1925 in Appeal from Appellate Decree No. 586 of 1923, against the decree of Babu Probodh Chandra Basu, Subordinate Judge, 3rd Court, of Dacca, dated the 19th September, 1922, affirming that of Babu Satchidananda Mukherji, Munsif, 2nd Court, at Munshiganj, dated the 1st December, 1921.

possession of land as tenants are under an implied obligation to pay the rent for the land to the landlord, whether they got into possession by right of succession or assignment.

A tenant in common is entitled to possession of every part of the estate and there is privity of estate between him and the landlord in the whole of the leasehold. The law imposes a liability on a tenant-in-common based on privity of estate for all covenants running with the land, and as his estate is an estate in the whole of the leasehold, there is no reason why he should not be liable for the entire rent.

Per Mukerji, J: When a person obtains a share of a tenure either by assignment or by inheritance he becomes co-tenant with the other tenant or tenants in the whole tenure, and in so far as the relations between him and his landlord are concerned he cannot be deemed to hold any estate in severalty. Each one of the persons on whom a share of the estate may vest by assignment or inheritance becomes a tenant-in-common in the whole of the estate by reason of the indivisibility of the estate without the landlord's consent. Each one of such co-tenants has a privity of estate with the lessor in respect of the whole estate and will be liable to the lessor on the covenants running with the land, and so, for the whole rent: *United Dairies Ltd. v. Public Trustee* (1).

Per. B. B. Ghose, J: Section 43 of the Indian Contract Act may be applied in such a case; that section is applicable to express as well as implied promises.

Per Mukerji, J: Except in the case of original lessees or persons who were parties to the contract, the provisions of section 43 of the Indian Contract Act have no application.

Per Mukerji, J: If lands are let out to two or more tenants, their liability to pay the rent is joint and several, except where it is made joint and not several by express agreement; the liability of assignees of the original tenant or tenants may be a joint liability *inter se* as amongst the assignees, or it may be a joint and several liability; if there is an agreement to that effect the liability of the persons upon whom the rights of the original tenant or tenants devolve on the death of the latter is a joint liability to the extent of the interest which devolves and not a joint and several liability in respect of that interest, as the whole body of persons who succeed in this way constitute in law but one heir.

Cases of joint liability or of joint and several liability do not come with right to have his co-debtors joined: *Wilson, Balcarres Brook Steamship Co. (2)* and *Robinson v. Guisel* (3).

In this country there is no reason why this general right should be denied to a person under a joint liability where the liability arises not under a contract to which order 1 rule 6 of the Code of Civil Procedure is confined and where the persons are neither severally nor jointly and severally but are only jointly liable.

In a case where the liability of the defendants arises not on contract, but on

(1) 1923 L. R. 1 K. B. 471.

(2) 1892 1 Q. B. 422 (424).

(3) 1894 2 Q. B. 685 C. A.

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account of privity of estate, the defendant may insist on all the persons jointly liable, to be made party defendants. All such persons are not merely proper, but also necessary parties. If objection is taken to the maintainability of the suit in their absence, the Court has to follow the provisions of order 1 rule 10 (2) of the Code of Civil Procedure.

In a suit for rent, persons who are under a joint liability to pay the rent, are necessary parties.

A lessor is bound to implead in his suit all the lessees or assignees from the lessees who are known to him.

A decree obtained in the absence of some of the co-tenants is not a nullity but a valid decree and is effective only as a decree for money.

But, if objection is taken at the right moment as to the maintainability of the suit, the suit is not properly constituted.

Appeal by Defendant No. 1.

Suit for recovery of arrears of rent.

The facts of the case were as follows :

This was a suit for arrears of rent in respect of an intermediate tenure Khanda Kharid Gour Sundar Sing under the superior Taluq Omar Daraj. Plaintiffs were a four-anna co-sharer landlords and alleged separate collection. The total rent was Rs. 62-4 and in the plaintiffs' 4 anna share it was Rs. 15 and odd. Rent was claimed at this rate with cesses Rs. 9 and odd per year and the claim was laid at Rs. 117-4. On the death of Gour Sundar Sing, the original tenant, a certain share of the tenure devolved upon his heirs and the remainder had vested in a large number of transferees from him. The record of rights showed that 21 persons were recorded as owners thereof and the present suit was instituted against two of Gour Sundar's heirs and two out of the many different transferees. The Courts below over-ruled the contention of the defendants that the suit was not a properly constituted one for defect of parties and decreed the suit.

The defendant No. 1 appealed to the High Court. and the appeal was heard by Greaves and M. N. Mukerji, JJ. who referred the case to the Full Bench by the following judgment :

This appeal arises out of a suit wherein the plaintiffs as four annas co-sharers of a certain Taluq sought to recover arrears of rent from the defendants who they alleged were holding under them as tenure-holders. The defence of the defendants, in substance, was that they were not tenure-holders but co-proprietors of the estate and further that the suit was not maintainable as all the persons who are successors-in-interest of the original transferee Gour

Sunder Sinha and whose names are recorded as such in the finally published record of rights were not made defendants therein.

The suit was decreed by the Court of first instance, and the said decision has been upheld by the lower appellate Court. The defendants have thereupon preferred this appeal, in which the validity of the decisions of the Courts below has been challenged upon the two grounds which formed their defence as stated above.

As regards the first of these grounds we are not prepared to accede to the appellant's contention. This necessitates our dealing with the second ground.

So far as the second ground is concerned, on the finding of the lower appellate Court it is clear that some of the persons on whom devolved the interest of the original transferee Gour Sunder Sinha, by purchase and inheritance, have not been made parties to the suit. The question whether under such circumstances the suit is maintainable is one about which there is a clear conflict of judicial opinion in this Court, and we must necessarily dissent from one or other of the catena of decisions dealing with the point.

The authorities in favour of the view that a suit framed in this way is maintainable are the cases of *Chamatkari Dasi v. Triguna Nath Sardar* (1); *Lalit Mohun Singh Roy v. Haran Chandra Khamrin* (2); *Subashi Dasi v. Raj Krishna Roy* (3); *Meajan Mondal v. Jogendra Nath De* (4). A contrary view has been taken in the cases of *Kasi Kinkar Sen v. Satyendra Nath Bhadra* (5); *Shaikh Sahad v. Krishna Mohan Basak* (6); *Sibkrishna Sinha v. Jagat Chandra Talukdar* (7), and *Abinash Chandra Roy v. Fulchand Chaudhuri* (8). In the case of *Krishna Das Roy v. Kalitara Chaudhurani* (9) Chatterjea, J. expressed an opinion that the liability of all the heirs of a contracting tenant is a joint liability, but Richardson, J. reserved his opinion on that question.

This conflict has been noticed in several cases decided in this Court, amongst which reference may be made to the decision in the case of *Mohendra Nath Bose v. Abinas Chandra Bose* (10),

(1) (1913) 17 C. W. N. 833.

(2) (1916) S. A. No. 1015 of 1915, decided on 18th July.

(3) (1918) 23 C. W. N. XXVIII.

(4) (1920) Unreported. S. A. No. 318 of 1919, decided on 13th July.

(5) (1910) 13 C. W. N. 191; 12 C. L. J. 642.

(6) (1916) 24 C. L. J. 371.

(7) (1918) S. A. No. 1279 of 1916 decided on 4th April; (1918) 45 I. C. 732

(8) (1923) I. L. R. 50 Calc. 737.

(9) (1917) 22 C. W. N. 289.

(10) (1923) 27 C. W. N. 521.

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in which the advisability of referring the matter to the Full Bench was recognized. In the present case, the question directly arises and in our opinion it must be decided in order to dispose of the appeal.

The point upon which we must necessarily differ from the one or the other set of decisions referred to above is as to whether a suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record.

We accordingly refer the case to the Full Bench in accordance with the provisions of rule 2. Chapter VII of the High Court Rules, Appellate side.

Babu Uperdra Kumar Roy (with *Babu Mon Mohan Banerjee*) appeared for the Defendant Appellant : (I) Section 43 of the Indian Contract Act relating to joint promisors did not apply to the case of heirs and transferees of one original contracting party.

At the inception of the tenancy in favour of one person no question of joint or several liability arose. On the death of the original tenant his heirs and successors-in-interest in law constituted one body and they could be sued together as one individual or not at all: *Decharms v. Horwood* (1); *Ahinsa v. Abdul Kader* (2); *Krishna Das v. Kalitara* (3); *Kasi Kinkar v. Satyendra* (4); *Abinash v. Fulchand* (5). Section 2 of the Contract Act defines "proposal" which when accepted becomes a "promise." Section 43 speaks of a joint promise. The heirs and transferees who come in by succession or on the strength of valid transfers cannot be supposed to have made any contract as is contemplated by the section. See *Sibkrishna v. Jagat* (6); *Shaikh Sahad v. Krishna* (7); *Satyabhusan v. Monmotha* (8). The covenant to pay rent runs with the land and unless the heirs and transferees enter into a fresh contract either express or implied they continue to be governed by the original contract. As there is no fresh attornment individually the liability remains one for which they are responsible in a body.

[B. B. Ghose, J : Is that necessary ? They become tenants-in-common by privity of estate and being in possession must be presumed to have made a joint promise to pay].

No doubt the class of cases which maintain that section

(1) 10 Bing. 526 (529).

(2) (1901) I. L. R. 25 Mad. 26 (35).

(3) (1917) 22 C. W. N. 289 (293).

(4) (1910) 15 C. W. N. 191 (195); 12 C. L. J. 642.

(5) (1923) I. L. R. 50 Calc. 737.

(6) (1918) 45 I. C. 732.

(7) (1916) 24 C. L. J. 371.

(8) (1914) 27 I. C. 313.

45 applies to the heirs have relied chiefly on the factum of actual possession : *Lalit v. Haran* (1) ; *Subashi v. Raj Krishna* (2) ; *Meajan v. Jogendra* (3). But so long as the tenancy continues and there is no surrender or relinquishment the question of possession becomes immaterial for they would be liable for the rent all the same even if not in actual possession : See *Baoli Bibi v. Hamijuddi* (4) and *Peary v. Kumaries* (5). There ought to be some distinction between squatters who become tenants at the option of landlords and the heirs who come into possession of a pre-existing tenancy with all its incidents and liabilities—a case of “inherited contract” as described in *Shaikh Sahad v. Krishna* (6). (II) Assuming that section 43 does apply to the heirs and successors-in-interest the liability is joint and cannot be joint and several : “Joint” not in the sense in which it is understood under the common law of England with its distinguishing feature of survivorship but as giving rise to a joint cause of action which is exhausted when a suit has been brought against any one of the joint promisors. Second suit against the others, the previous decree remaining unsatisfied, is barred. This principle which was laid down in the case of *King v. Hoare* (7) ; *Kendall v. Hamilton* (8), was recognised in India by the High Courts of Calcutta, Madras and Bombay but not by the High Court of Allahabad. See *Hemendro v. Rajendro Lall* (9) ; *Gursami Chetti v. Samurti* (10) ; *Lukmidas v. Purshotam* (11) ; *Muhammad v. Radhe Ram* (12). Section 43 does not convert a joint liability into a joint and several liability. In *Krishna v. Kalitara* (13) the observations of Richardson, J. pointing out the distinction between a joint, and a joint and several, liability appear to have been based on the idea of joint liability as understood in England which except in Mitakshara families is unknown in India and apparently ignores section 42 of the Indian Contract Act which speaks of the joint liability of the heirs of one joint promisor with the surviving promisor.

Whether a liability is joint or joint and several is a question of construction : Halsbury's Laws of England, Vol VII Article 694 And in case of joint and several liability each of the joint promisors

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(1) (1916) 36 I. C. 243.

(2) (1918) 23 C. W. N. XXVIII.

(3) (1920) 63 I. C. 949 ; I. L. R. 48 Calc. 518.

(4) (1910) 12 C. L. J. 267.

(5) (1892) I. L. R. 19 Calc. 790.

(6) (1916) 24 C. L. J. 371.

(7) (1844) 13 M. & W. 494.

(8) (1879) 4 App. Cas. 504.

(9) (1878) I. L. R. 3 Calc. 353.

(10) (1881) I. L. R. 5 Mad. 37.

(11) (1882) I. L. R. 6 Bom. 700.

(12) (1900) I. L. R. 22 All. 307.

(13) (1917) 22 C. W. N. 289 (193).

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must at the same time make the same promise to the promisee : Article 693 of the same volume.

These are the principles applicable in construing express contracts, and in cases of implied contracts the matter is more difficult ; separate considerations must move from the parties separately and individually : See Addison on Contracts, 11th Edition p. 318 and *Satyabhusan v. Monmotha* (1). In the case of heirs and successors-in-interest there is no room for any such implication unless and until a fresh tenancy is created in their favour on a determination of the old. Case of two or more original contracting parties stands on an altogether different footing and the liability in such cases may be joint and several. See *Mohendra v. Abinas* (2) where a suit against all the heirs of one of the original tenants was held to be a properly constituted suit.

(III) The cases of this Court which have held that section 43 is applicable to heirs etc. have proceeded mainly upon (i) the observations of Jenkins, C. J. in *Chamatkari v. Triguna* (3) where, without explaining the matter, his Lordship says that the liability of the heirs is contractual and (ii) upon the question of possession. It will appear that the said observations in *Chamatkari v. Triguna* (3) are mere *obiter* the suit being one in which the effect of a decree against some of the heirs was considered. *Lalit v. Haran* (4) relies on *Chamatkari v. Triguna* (3) as to fact of possession ; *Subashi v. Raj Krishna* (5) gives no detailed reasons ; *Meajan v. Jogendra* (6) simply follows the earlier decisions and there were special grounds which could support the decision viz. a previous decree. The question of rent falling due in the time of the original tenant or in the time of the heirs is not of much importance as rent is a first charge on the tenure and nobody who wants to remain in possession can escape the liability to pay the same.

(IV) In the cases where the landlord sues only the recorded tenant the question of representation is of material importance and if the co-tenants have allowed one of them to represent them in the office of the landlord they must take the consequences of their own act and cannot afterwards be heard to complain.

In cases of tenures the landlord gets notice of transfers on deposit of landlord's fees and in the present case the record of rights finally published in the presence of the landlords conclusively

(1) (1914) 27 I. C. 313.

(2) (1923) 27 C. W. N. 521.

(3) (1913) 17 C. W. N. 833.

(4) (1916) 36 I. C. 243.

(5) (1918) 23 C. W. N. XXVIII.

(6) (1920) 63 I. C. 949 ; I. L. R. 48 Calc. 518.

proves landlords' knowledge. No case of hardship and inconvenience can be made out for landlords, they can easily obtain information if they choose to do so as to who are the heirs even in case of holdings not to speak of tenures.

Landlords here deliberately omitted to join the rest and hence this present suit is fit to be dismissed.

**Babu Prokas Chandra Pakrashi* for the Plaintiffs Respondents :

(I) The heirs of the deceased tenant inheriting from their predecessor by exercising possession and by other conduct must be presumed to have contracted impliedly on the same terms as those of the deceased on the principle of privity of estate.

They are in possession as tenants in common by virtue of the existing contract and intention of the parties is to be gathered from possession and their conduct. They are not trespassers.

They became jointly and severally liable ; to apply one test—the landlord cannot partially evict on breach of any condition any of the individual joint tenants. Refers to *Krishna v. Kalitara* (1) and *Meajan v. Jogendra* (2).

(II) Landlord is bound to sue the registered tenant and not to hunt for them all over the world : *Khetter v. Pran Kristo* (3). It was the duty of the heirs to notify their succession : Sections 15 and 16 Bengal Tenancy Act.

Babu Upendra Kumar Ray in reply :—Record of right in this case was prepared in the presence of the landlord and the question of sections 15 and 16 do not arise.

[B. B. Ghose, J : Does that exonerate the heirs from statutory liability to notify their successor ?]

Some of the heirs are on the record nothing to show that they do not represent the other brothers. As to the rest the landlord had statutory notice at the time of each transfer on deposit of landlords' fees.

Babu Ramendra Mohan Majumdar appeared for Defendant No. 2 Respondent whose interest was identical with that of the appellant.

The following judgments were delivered :

Walmsley J : I agree in the view expressed by my learned brother Mr. Justice B. B. Ghose in the judgment which he is going to deliver.

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(1). (1917) 22 C. W. N. 289 (295).

(2) (1920) 63 I. C. 949 ; I. L. R. 48 Calc. 518. (3) (1899) 3 C. W. N. 371.

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Greaves, J : I also agree in the view expressed in that judgment.

C. C. Ghose, J : The question that has been referred to the Full Bench is as to whether a suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record. In my view, the answer to the question ought to be in the negative. It will serve no useful purpose to discuss the conflicting authorities on the point. It is sufficient for me to observe that I adhere to the view which I expressed in the case of *Abinash Chandra Roy v. Fulchand Chaudhuri* (1). I have heard nothing during the course of the argument to induce me to depart from the opinion expressed by me in the above case. In my opinion, the suit as framed should be dismissed and the appeal preferred by the defendants allowed.

B. B. Ghose, J :—The facts of the case which led to this Reference shortly stated are these. The plaintiff is entitled to 4 annas share of a Taluk under which there is a tenure which formerly belonged to one Gour Sundar Singh and which by successive devolutions and assignments has come into the possession of about twenty persons. The plaintiff has sued for his share of the rent of the tenure for the years 1324 to 1327 B. S. five persons some of whom have acquired their interest by succession and others under assignments from some of the heirs of Gour Sundar. All these persons were in possession during the period in suit along with others who have not been made parties. The only plea which now requires consideration is that the suit is not maintainable as the other tenants have not been made parties. The trial Court passed a decree for money personally against the defendants and held that the tenure would not be bound by the decree, and on appeal that decree was affirmed by the Subordinate Judge. One of the defendants preferred a second appeal to this Court. There are two lines of cases in this Court taking contrary views, which has made it necessary for a Reference to the Full Bench of the question "whether a suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record."

It would scarcely serve any useful purpose to examine the various conflicting authorities. The question should be decided on well-recognised general principles. It is argued that the tenancy as well as the liability for payment of rent has been inherited by

(1) (1923) I. L. R. 50 Calc. 737.

the representatives of the deceased tenant one body and this body as a whole is liable for the rent on the contract of their predecessor. If the landlord omits to implead any one of them in his suit for rent, the suit is defective and must be dismissed for not having been brought against the body of representatives as a whole. This argument seems to me to be grounded on a misconception. The heirs did not take the tenancy as an entire body forming as it were a partnership or a corporation, the individual members of which have no definite interest. They took as tenants in common, each having a definite share in the whole, which he might deal with in any way he pleased. As a matter of fact, as already stated, some of the heirs of the original tenant had assigned their interest to third persons. The liability of a tenant to pay rent arises from the fact of possession of the land as a tenant where there is no express contract, and all persons in possession of land as tenants are under an implied obligation to pay the rent for the land to the landlord, whether they got into possession by right of succession or assignment. A tenant in common is entitled to possession of every part of the estate and there is privity of estate between him and the landlord in the whole of the leasehold. The law imposes a liability on a tenant in common based on privity of estate for all covenants running with the land, and as his estate is an estate in the whole of the leasehold, there is no reason why he should not be liable for the entire rent. This view is supported by what is stated in Leake on Contracts, 7th Edn. at p. 931, that each tenant in common being possessed of the whole may be sued separately upon covenants running with the land. Thus, whether a contract is implied for payment of rent by all tenants in common in possession of a leasehold, or whether it is held that the law imposes the liability for payment of rent by reason of privity of estate, any one of such tenants may be sued for the entire rent due to the landlord. This may be either in accordance with the provisions of section 43 of the Indian Contract Act, which applies to express as well as implied promises or under the general law based on privity of estate.

It is hardly necessary to add that a decree in such a suit will not have the effect of a decree for rent under Chapter XIV of the Bengal Tenancy Act.

On the grounds stated above I would answer the question in the affirmative, with the result that the appeal should be dismissed.

Mukerji, J : The authorities bearing upon the point involved

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in this Reference have all been noticed and their precise effect accurately summarised in the judgment of my learned brother Chatterjea, J. in the case of *Mohendra Nath Bose v. Abinash Chandra Bose* (1) and it is unnecessary to discuss them as the question has to be answered upon broad and general principles.

The question is whether a suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record. To answer this question, the matter has to be considered from two distinct points of view : *firstly*, from the point of view of the defendants' liability and *secondly*, from the point of view of the frame of the suit.

As regards the first of these matters, we start with the position that in view of section 88 of the Bengal Tenancy Act, it must be conceded that when a person obtains a share of a tenure either by assignment or by inheritance he becomes a co-tenant with the other tenant or tenants in the whole tenure, and in so far as the relations between him and his landlord are concerned he cannot be deemed to hold any estate in severalty. Each one of the persons on whom a share of the estate may vest by assignment or inheritance becomes a tenant in common in the whole of the estate by reason of the indivisibility of the estate without the landlord's consent. Each one of such co-tenants has a privity of estate with the lessor in respect of the whole estate. The proposition is thus enunciated in Foa on Landlord and Tenant, sixth Edition p. 469 : "Where, however, the share of the demised premises is not held by the assignee in severalty as where they become vested in joint tenant or tenants in common the case is different because he, with others, holds the whole estate, and privity in respect of it exists accordingly between him and the lessor." From this it would seem to follow that each of the joint tenants or tenants in common would be liable to the lessor on the covenants running with the land, and so, for the whole rent. The contrary view was contended for in the case of *United Dairies Ltd. v. Public Trustee* (2). In that case Greer, J. observed as follows :—"The present case was argued before me on the assumption that in English Law, whatever may be the case in Ireland, a tenant in common is not liable for the whole rent, but only for a proportionate rent, but I do not think this question appears to be definitely concluded by any of the decisions in the English Courts." The learned Judge exhaustively dealt with the authorities bearing upon the point and explaining the decision in the case of

(1) (1923) 27 C. W. N. 521.

(2) (1923) L. R. 1 K. B. 471.

Merceron v. Dawson (1) which apparently contains dicta to the contrary effect, further observed as follows :—"It seems to me, on the authorities, that it has never been conclusively established that an assignee holding with other tenants under the terms of the original lease is not liable jointly with those other tenants for the whole rent. He has an interest in the whole of the land leased : and I see no valid reason why tenants in common should be in a position as regards liability for rent different from that of joint tenants. I am inclined to think that each of the tenants in common has the privity of estate with the landlord in the whole of the land leased." The reasoning of the learned Judge seems to be unassailable and I agree in his conclusions. I am accordingly of opinion that each one of the defendants in the present suit is liable for the entire rent and there can be no objection to the maintainability of the suit on that ground. I am further of opinion that except in the case of original lessees or persons who were parties to the contract, the provisions of section 43 of the Indian Contract Act have no application and need not be resorted to.

Turning now to the other question, namely, whether the suit is maintainable by reason of defect of parties, the point is as to whether all the persons who are under a joint liability are necessary parties to a suit based upon such liability. Here again we start with the following propositions : If lands are let out to two or more tenants their liability to pay the rent is joint and several, except where it is made joint and not several by express agreement ; the liability of assignees of the original tenant or tenants may be a joint liability *inter se* as amongst the assignees, or it may be a joint and several liability if there is an agreement to that effect the liability of the persons upon whom the rights of the original tenant or tenants devolve on the death of the latter is a joint liability to the extent of the interest which devolves and not a joint and several liability in respect of that interest, as the whole body of persons who succeed in this way constitute in law but one heir.

S. 43 of the Indian Contract Act expressly refers to "promisor" and "promisee." As far as the liability under a contract is concerned, it appears to make all joint contracts joint and several. O. r R. 6 Civil Procedure Code provides that the plaintiff may at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract including parties to bills of exchange, hundis and promissory notes. Cases of joint liability or of joint and several liability which do not

(1) (1826) 5 B. and C. 479.

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come within section 43 of the Contract Act or O. 1 R. 6 must be treated as cases for which no exception has been made in this country to the general rule which obtains in English common law and which is in consonance with justice, equity and good conscience. In the words of Lord Redesdale "All persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of Court may be safely executed by those who are compelled to obey them, and future litigation may be prevented." This general rule embraces two classes of parties as defendants, that is to say those who are indispensable and necessary parties without whom no decree at all can be rendered, and those who are proper parties whose presence makes the adjudication more complete and effectual. Under the English law where the liability is a joint and several one the plaintiff will not be compelled to add all the persons so liable as defendants: *Chalmers v. Guthrie* (1); but where an action has been commenced against one or some only of several joint contractors the defendant or defendants can apply to have the other joint contractor or contractors added and the proceedings stayed until this is done: *Kondall v. Hamilton* (2). The effect of the latest decisions seems to be a joint debtor, though he has not an absolute, has an ordinary and a *prima facie* right to have his co-debtors joined: *Wilson, Balcarres Brook Steamship Co.* (3); *Robinson v. Geisel* (4). There is, in my opinion, no reason why this general right should be denied in this country to a person under a joint liability where the liability arises not under a contract to which O. 1 R. 6 is confined and where the persons are neither severally nor jointly and severally but are only jointly liable.

In a case where the liability of the defendants arises not on contract, but on account of privity of estate, the defendant may insist on all the persons jointly liable, to be made party defendants. All such persons, in my opinion, are not merely proper, but also necessary parties. If objection is taken to the maintainability of the suit in their absence, the Court has to follow the provisions of O. 1 R. 10 (2) of the Civil Procedure Code. In England it has been the essence of the procedure since the Judicature Act to take care that a suit shall not be defeated by the

(1) (1923) 156 L. T. J. 382.

(3) (1893) 1 Q. B. 422.

(2) (1879) 4 App. Cas. 504.

(4) (1894) 2 Q. B. 658 C. A.

non-joinder of the right parties. The same rule has been embodied in O. 1 Rr. 9 and 10 Civil Procedure Code. These two rules correspond to O. 16 R. 11 of the rules of the Supreme Court 1883 with regard to which the following is what has been said in Chitty and Marks' Yearly Practice of the Supreme Court 1925. "This Rule has not altered the legal principles with regard to the parties to actions or the right of a defendant to insist on the necessary parties before the Court. It has however altered the procedure and substituted an application to add the parties improperly omitted or to strike out the parties improperly joined or to stay the proceeding until the necessary parties are added. The Court has now, however, a discretionary power to refuse the order; but in the exercise of this discretion it is guided by the same principles as were applicable to the old plea in abatement."

In my judgment persons who are under a joint liability to pay the rent, are necessary parties, in a suit for rent. They are so from more points of view than one. They are necessary for determining whether the liability which is *prima facie* joint is also joint and several; for protecting the defendant from being made to pay what may have already been paid by others; for safeguarding against the eventuality of his being defeated in a suit for contribution, as the co-tenant against whom a suit for contribution is brought, will not be bound by the result of the earlier suit; for preventing conflicting decisions as to the character and incidents of the same tenancy being arrived at in different suits; and for various other reasons. That a lessor is bound to implead in his suit all the lessees or assignees from the lessees who are known to him is a principle recognised from the earliest times. Bayley J. in the case of *Merceron v. Dowson* (1) observed thus: "It may be conceded to the defendant that when the plaintiff is informed of the persons in whom the whole interest is vested they must be sued jointly." This principle has been seldom dissented from in this country, and there is no reason that I can think of why it should have been departed from. I do not suggest that a decree obtained in the absence of some of the co-tenants is necessarily a nullity; it is a valid decree and is effective only as a decree for money. But, if objection is taken at the right moment as to the maintainability of the suit, I am clearly of opinion that it should be held that the suit is not properly constituted." In *Rup Narain Singh v. Jugoo Singh* (2) it was ruled that a suit for rent from several raiyats on account of a holding which has been let out to them, cannot

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(1) (1862) 5 B. & C. 478.

(2) (1868) 10 W. R. 304.

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be brought against one of them, but must embrace all of them as defendants. This decision was passed before the Indian Contract Act was enacted. Section 43 of the Act and the provisions of the Civil Procedure Code relating to parties to an action have abrogated this rule in some measure only. In *Khetter Mohan Pal v. Pran Kristo Kabiraj* (1) it was assumed as well-settled that upon the death of the original tenant the landlord would be bound to sue so many at any rate of the heirs as had notified their names to him. The same principle appears to have been recognized almost consistently in this Court, and the following cases will show the current of judicial opinion on the point : *Ananda Kumar Naskar v. Haridas Haldar* (2) ; *Sreemati Jogemaya Dass v. Girindra Nath Mukherjee* (3) ; *Rammoy Dasi v. Rupai Pramanick* (4) ; *Abdul Rab v. Eggar* (5) ; *Baoli Bibi v. Hamijuddi Mandal* (6) ; *Kasi Kinkar Sen v. Satyendra Nath Bhadra* (7). I am aware that the rule has been departed from in recent years in some instances, but only on rare occasions and under exceptional circumstances. To depart from this rule gives rise to serious anomalies. To take the case of a permanent tenure, as an instance it would make nugatory the provisions of section 17 of the Bengal Tenancy Act and deprive the transferee of a share of his right to recognition which he is entitled to under the law.

It follows from what I have said above that in my opinion the suit as framed was not maintainable without impleading as defendants all the parties who are known to be the tenants of the holding. The plaintiff cannot take shelter under the plea of ignorance as to who the persons are : their names are entered in the finally published record of rights. The suit however cannot be dismissed on that ground. The Court must proceed under O. 1 R. 10 (2) Civil Procedure Code to make an order for the addition of such of these persons as are not already on the record as defendants, and it is only in the event of the necessary amendments not being made that the suit is liable to be dismissed. On such amendment being made the suit should be tried out in accordance with law, it being noted that the suit will not fail merely because the plaintiff may have lost his remedy against the added defendants.

In my judgment, therefore, the decree passed by the Courts below should be set aside, and the suit remanded to the Court of

(1) (1899) 3 C. W. N. 371.

(2) (1900) I. L. R. 27 Calc. 545 (549.)

(3) (1900) 4 C. W. N. 590 (592).

(4) (1905) 13 C. L. J. 267 (269).

(5) (1907) I. L. R. 35 Calc. 182 (184.)

(6) (1910) 12 C. L. J. 267.

(7) (1910) 15 C. W. N. 191.

first instance to be dealt with as indicated above, and all costs hitherto incurred including the costs of this Reference should abide the result.

The Court then passed the following order :

In accordance with the judgment of the majority the appeal is dismissed with costs before the Divisional Bench but without any order as to costs in respect of this Reference.

A. T. M.

Appeal dismissed.

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*Before Sir Ewart William Greaves, Knight, Judge, and Mr.
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February, 4, 12.

Dying declaration—Question of fact—Dying declaration, elicited as a result of leading questions and answers—Reference under section 307 of the Code of Criminal Procedure (Act V of 1908)—Foreman, reasons given by—High Court, when can refuse to accept the verdict of jury.

A dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable and reject that which is obviously untrue though to found a criminal conviction on such appraisal of evidence is very often unsafe. As regards a dying declaration, to accept a portion and reject the rest is entirely out of the question, there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon.

The law of a dying declaration in India is different from the law in England. A dying declaration is relevant under the Indian Evidence Act, whether the person who made it was or was not at the time when it was made, under expectation of death, and the weight to be attached to it depends not upon the expectation of death, which is a guarantee of its truth but upon the circumstances and surroundings under which it was made and very much also upon the nature of the record that has been made of it. It is almost always a question of fact as to whether it should be relied upon or not.

Where a statement is not the *ipsissima verba* of the person making it but is composed of a mixture of questions and answers, there are several objections open

*Criminal Reference No. 62 of 1924 by H. C. Stork Esq., Sessions Judge of Chittagong, dated the 29th September, 1924.

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to its reception in evidence, which it is not desirable should be open in cases in which the person has no opportunity of cross-examination. In the first place the questions may be leading questions and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being freely comprehended. In such circumstances the form of the declaration should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the examining Magistrate and how much was the production of the person making the statement: *R. v. Mitchell* (1).

If it appears to the jury that a dying declaration has been elicited as a result of leading questions and answers, it is a matter entirely within the province of the jury to attach little or no value to it.

The reasons given by the foreman need not necessarily be taken as constituting all the grounds which he and the other jurors may have had for their verdict.

Even when most of the reasons given by the foreman be not very convincing, the verdict will not be rejected on a reference under section 307 of Criminal Procedure Code unless it is unreasonable.

In a reference under section 307 Criminal Procedure Code, the High Court cannot refuse to accept the verdict of the jury unless it is unreasonable.

Reference under section 307 of the Code of Criminal Procedure.

The material facts appear from the following.

Reference.

1. *A brief outline:* The case is concerned with the murder of Sub-Inspector Profulla Kumar Roy, at Chittagong, on the evening of May 25th last. There is no dispute that the Sub-Inspector met his death by revolver, or pistol shots on that day. The prosecution case is that his murderer was one Premananda Dutta, son of Harish Chandra Dutta, of Chittagong, a Congress volunteer, and a young man who had been watched for some time as a political suspect. The main evidence of the prosecution is to the effect that the Sub-Inspector gave out the name of his assailant to a number of witnesses who came from the houses near by on hearing the shots and his cries, and that in a statement recorded about an hour subsequently by the Sub-Divisional Magistrate, he again gave the name of his assailant, with an account of certain circumstances leading up to the occurrence. The prosecution also adduced evidence of a circumstantial nature, concerned with previous relations between Premananda Dutta and the deceased Sub-Inspector, and setting forth an alleged motive for the crime.

Premananda Dutta was arrested early the morning following the crime, and was put on trial and committed to the Sessions, where, after a motion for transfer of the case on certain grounds had been

(1) 17 Cox C. C. 503 per Cave J.

rejected by the Honourable High Court, he was tried by me with the assistance of a special jury. The jury have unanimously found him not guilty.

2. It is this *finding of the jury* which I am unable to accept, and after a careful examination of all the circumstances and the evidence, I refer the case in the conviction that the verdict is unsubstantial, is against the weight of the evidence, and if accepted and acted upon would occasion a grave miscarriage of justice.

3. *A statement of reasons for this reference.* The locality and its surroundings will be clear from the plan Exhibit 1 prepared and proved by P. W. 1., a surveyor in the Land Acquisition department. The actual place of occurrence is said by the prosecution to be at a place where three trees grow, towards the eastern side of the maidan known as the "Pultan Ground" or "Pultan field." The prosecution have adduced the evidence of nine witnesses P. W.'s 2, 4, 5, 6, 7, 8, 9, 10 and 12 with regard to the hearing of shots and cries from this place, and it is mainly on the evidence of Nos. 2, 4, 5, 6, 7, 8, and 10 that they rely in fixing the guilt on the accused. P. W. 2 is Rai Bahadur Satish Chandra Sen, the Government Pleader of Chittagong, and the President of the local Bar Association whose house is at the south-east corner of the maidan. His evidence is that he heard three shots from a north-westerly direction (in which direction the trees lie), followed immediately by a cry. The interval that elapsed between this and his coming out was very small, within a minute or two, and he saw something that looked like a man being carried on to the road, in a westerly direction, which brought him to the gate of the house of the Excise Superintendent, who is the Government Pleader's neighbour to the north. The witness recognised the man, who was bleeding, as Profulla Kumar Roy, Sub-Inspector, and in answer to a question the latter said that Premanada Dutta had shot him.

The prosecution also examined two excise peons, Rajani Kanta De (P. W. 9) and Biseswar Das (P. W. 6) whose evidence is to the effect that on hearing the shots, after a little delay sufficient to fetch a light, they went to the trees, found Profulla Babu there, and carried him, or assisted him on to the road. Biseswar states that in reply to a question, Profulla Babu said Premananda had shot him, and in reply to a question "Which Premananda?" answered "son of Harish Dutta." This was before they helped him on to the road. The evidence of Rajani is practically identical.

There is further the evidence of three witnesses, Nalini Kumar Chaudhury (P. W. 4) a clerk in the Traffic Manager's office of the

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A. B. Railway, Dharendra Nath Maitra (P. W. 7) an M. A., B. L., who has applied for permission to start practice as a pleader, and Rasik Chandra Bhattacharjee (P. W. 8), the Sadar Kanungoe of Chittagong all of whom live in the house of Babu Monoranjan Maitra, the personal assistant to the Commissioner, which lies in a south westerly direction from the alleged place of occurrence. The evidence of these witnesses is that they came running with a lantern on hearing the shots and cry, that they came to the tree where they saw the injured man being either raised or helped along towards the road. P. W. 8 says that it was on the road that Profulla Babu said that Premananda had shot him, and in answer to a question said it was "Premananda, son of Harish Dutta." P. W. 7 gives similar evidence. P. W. 4 states that it was whilst they were taking him to the road, and before they got there, that he said it was Premananda who had shot him, and that the question "which Premananda?" and the answer "Premananda son of Harish Dutta" occurred on the road.

In giving their reasons for their verdict, the foreman of the jury stated that they found that there were many contradictions in the depositions of the witnesses that militated against their accuracy and that they found discrepancies regarding the manner in which Profulla gave out the name and father's name of his assailant. They consider, which is the defence suggestion, "that Premananda's name was inspired to him by some one there." With the latter opinion I find myself totally unable, on the evidence, to agree. That there are contradictions and discrepancies it is impossible to deny. I have given the depositions of these witnesses most careful and anxious consideration. I particularly noted their demeanour in the box. The Government Pleader is a gentleman who by his position and character is deserving of the very highest possible reliance. The three gentlemen from Monoranjan Babu's house gave their evidence in a manner I found satisfactory and convincing. I saw no reason whatever to regard with suspicion the evidence of the Excise peons. The irresistible impression I derived from this evidence, both in general and in detail, was that the witnesses arrived at the scene with such despatch that there was not the remotest possibility of any interested person having access to the injured Sub-Inspector in such a way as to succeed in persuading him to give a name falsely. My irresistible impression is that the discrepancies regarding the actual place where the name, or the name with the father's name, of the assailant were given out by the Sub-Inspector, are due entirely to the fact that the witnesses are truthfully giving their own personal

experience. I am of opinion most distinctly that the Sub-Inspector was being continually asked—as was only natural under such circumstances—who his assailant was, and that the witnesses are truthfully deposing as to the exact place and time when the answer was heard by them individually.

The allegations that the name was suggested to Profulla Babu, in my opinion, do not bear the test of examination. It is suggested to Inspector Coulter (P. W. 10) who lives in a house on the western border of the maidan, that he was the first to reach the Sub-Inspector, and that he was the source of the inspiration. It is suggested that the occurrence was under a mango tree which is at the south west corner of the maidan and that Inspector Coulter found Profulla Babu there, and went with him to the three trees on the eastern side, persuading him meanwhile to give the name falsely. It is pointed out that in his statement recorded by the S. D. O., Profulla Babu makes mention of a mango tree, and it is known that the only mango tree is the one near Inspector Coulter's house. It is submitted that there cannot be any substance at all in these suggestions. Inspector Coulter's evidence is that he delayed for ten minutes whilst he got out of a box his rifle (it is no part of my intention to criticise his conduct), and that when he reached the scene Profulla Babu had already been put in the carriage which it is in evidence was standing outside the Government Pleader's house, and this evidence is in my opinion corroborated by that of Mr. Black (P. W. 9) who lives in the house of Messrs. Bullock Brothers at the south east corner. This gentleman on hearing the shots and cry, sent his servants to enquire, and himself went a short time later, and he deposes that his arrival coincided with Inspector Coulter's. The latter also states that he did not even know Premananda's name before. He has been stationed here since November last, and I can find nothing in the evidence remotely suggesting the possibility of his even desiring to persuade Profulla Babu to give the name falsely.

It is suggested also that other police officers were there, and had access to Profulla Babu before he gave out the name. I am most clearly of opinion that the suggestion is untenable. I am of opinion that Profulla began to give out the name (and I regard the discrepancies as to the exact moment when the father's name was given as indicating the *bona fides* of the evidence, and as being in fact natural and inevitable under the circumstances) at the time his rescuers first appeared, and continued doing so in answer to questions. It is in evidence that he twice asked to be left alone and

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not "bothered" or "vexed". There is no direct evidence that any police officers were present whilst Profulla Babu was being taken to the road or put into the carriage, and it is during this period that the evidence indicates that he gave out the name of his assailant. The fact that the senior Sub-Inspector Babu Beni Madhub Chaudhury (then officiating as Inspector P. W. 21) was on tour that day in the mofussil and that, according to their evidence (which in my opinion has not been assailed and should be accepted) the two Sub-Inspectors, Moulvi Sharafatulla (P. W. 19) and Babu Sachindra Kanta Bhowmic (P. W. 20) were both present in the *thana* a mile or so away at 9—10 p.m., when the first information was received over the telephone (the evidence clearly indicating that the occurrence was at 8-30 p.m. or a little later) precludes the possibility of their being concerned in the matter.

My decided opinion is that the finding of the jury that the discrepancies noticed (and set forth in the charge to the jury, and to which I have given every consideration) cast doubt upon the voluntary nature of Profulla Babu's naming the accused as his assailant is untenable and result from anything but a reasonable survey of the evidence. I am clearly of opinion that the circumstances preclude any possibility of Profulla Babu's being inspired by outside influence, unknown to the witnesses, to give a false name. I am also clearly of opinion that Profulla Babu was not giving a false name of his own accord. This opinion is based on a review of the whole evidence. Other circumstances point distinctly in my opinion to corroboration of Profulla Babu's statement, and it is impossible to ignore the general consideration that a man in his condition (the evidence clearly indicates he was expecting death) would be not only most unlikely to implicate a person falsely, but would be incapable of doing so.

The jury have found that the "dying statement" recorded by the Sub-Divisional Magistrate at 9-45 p.m. that night at Messrs. Bullock Brothers' Bungalow is vitiated by the putting of leading questions to him. The point has been fully discussed in the charge to the jury, and it is a finding against which I am diffident in expressing a contrary opinion. I am however decidedly of opinion that even if this finding of the jury is a true one, there is no justification arising therefrom to reject the whole of the prosecution case. This statement was recorded sometime after the statements made by the Sub-Inspector to the witnesses as discussed above, and it is on these statements which the prosecution is bound mainly to rely.

I consider it unnecessary to enlarge on this question, as my position is that the statements of Profulla Babu to the above-mentioned witnesses are sufficient to establish the guilt of the accused, and that even if the evidentiary value of the statement recorded by the Sub-Divisional Magistrate is impaired, or even altogether destroyed, by a conviction that it was mainly or entirely the result of leading questions, such a finding cannot alter the fact that those previous statements were made.

It is also my opinion (a point on which the jury have not expressed a definite finding) that the circumstantial evidence adduced by the prosecution, and set forth in the charge to the jury, is entitled to belief. The evidence of motive is in my opinion very strong, that the murder was prompted by the accused's anger with the Sub-Inspector on account of the arrest of one Ananta Lal Singh, and an account of his connection with the detection of a case known as the "Manicktolla Case." It is of course nowhere suggested in the evidence in this case that the accused had any criminal connection with the said Ananta Lal Singh, or with any persons concerned in the Manicktolla case, but, in spite of the considerations given above in connection with the dying declaration of Profulla Babu I find it impossible, from a point of view of reasonableness and common sense, to reject as worthless that part of the statement in which Profulla Babu gives the motive himself, as alleged to have been given him by his assailant: "you are a dangerous man. You were responsible for the detection of the Manicktolla case, and arrested Ananta Singh". It is in my opinion impossible to hold that this passage had its origin in the inspiration of any bystander, and it is in my opinion satisfactorily corroborated by the evidence discussed in the charge, and by the whole circumstances and probabilities of the case.

I cannot agree with the finding of the jury that there is "considerable doubt as to the time when Profulla went to the place of occurrence." The evidence of P. W. 14 in my opinion is of great significance in showing that Profulla Babu left the police club, for an appointment at a time which would bring him to the maidan at the hour he states (7 p.m.). I cannot find that the evidence of Syama Charan De (P. W. 11), as discussed at length in the charge to the jury, in any way precludes the possibility of Premananda's being with Profulla at, or shortly after 7 p.m. and continually till 8-30 p.m. or shortly after. There is a very striking contradiction between the

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evidence of this witness, and the statement made by Prafulla Babu, regarding the actual character of the appointment made between Prafulla Babu and Premananda, which has been set forth at length in the charge to the jury. I cannot find that this contradiction is sufficient to vitiate the whole case. It is no part of my intention to suggest explanation for it. It is however my strong conviction that to allow it unduly to prejudice the decision of the case is unreasonable, and that to regard the whole case as false merely because of such a contradiction is unwarranted by a proper consideration of the case as a whole.

The jury also state that they have given consideration to the fact that there are no eye-witnesses. It is submitted that under the circumstances of the case there could not be any such eye-witnesses.

I can find nothing in the probabilities of the case sufficient to throw any doubt whatever upon its truth. The jury look with suspicion upon the fact that Prafulla Babu is said to have gone unarmed to meet a dangerous political suspect. I can find no reasonable ground for supposing that he anticipated any danger.

The actual place of occurrence is a little way from the public road, and on a dark night would be invisible from the road. Moreover it is to my mind clear beyond a shadow of doubt that Prafulla Babu was murdered by revolver shots in this place. This reference is made in view of my clear opinion, even though it is opposed to a unanimous verdict of a jury, that the evidence that Prafulla Babu gave out the name of the accused as his assailant, not only immediately but continually, and of his own accord, is conclusive, and that it represented the truth.

4. It is therefore *recommended* that the verdict of the jury be not accepted, and that the accused Premananda Dutta be convicted of the offence of murder as I can see no circumstances warranting a conviction for a higher offence. The delay in submitting this letter is due to the fact that the Reference was originally made, by mistake, through the Legal Remembrancer.

Mr. K. N. Chaudhuri and Babu Probodh Chunder Chatterjee for the Accused.

Mr. B. L. Mitter (Standing Counsel) for the Crown.

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The judgments of the Court were as follows :

Mukerji: J. The accused Premananda Dutta was tried by the Sessions Judge of Chittagong with the aid of a jury on a charge under Sec. 302, I.P.C., for causing the death of one Prafulla Kumar Roy by shooting him on the Paltan ground in the town of Chittagong on

the evening of May 25th, 1924 at about 8-30 P.M. The jury brought in a unanimous verdict of Not Guilty, and the learned Judge having disagreed with the same, has submitted the case to us under the provisions of Sec. 307, Cr. P. C.

In the course of an elaborate summing up, which is remarkable for its lucidity and its fairness, the learned Judge has set out all the facts and circumstances of the case and the various points that arise for consideration and his charge has been of immense assistance to us in dealing with the case.

The accused Premananda Dutta, according to his own statement was a Preventive Officer in the Customs Department, which appointment, he says, he resigned and he became a Congress Volunteer. He appears to be a young man about 24 years of age, and is what is ordinarily known as a political suspect.

The deceased Profulla Kumar Roy was a Sub-Inspector of the Criminal Investigation Department. The accused and the deceased appear to have been known to each other for some time past, and there is evidence to show that since February 1924, the deceased was in touch with the accused, presumably watching him as a political suspect, and had met him on several occasions,—on some occasions by appointment.

The case for the prosecution is that on the day and at the hour mentioned before the accused and the deceased met by appointment at about 7 P.M., talked together for sometime and they had talks on political matters, that they were seated under a tree, and eventually the accused said to the deceased "Prafulla Babu, you are a very dangerous man, you caused the Manicktola case to be detected and Ananta Singh arrested;" that the deceased replied, "What can I do? I am a paid servant." It is said that the accused then stood up and asked the deceased whether he would not leave the place; to which the deceased replied in the negative and said that the accused might go. The prosecution case is that when in this position the accused fired 3 shots at the deceased, as far as can be made out the time when the shots were fired was somewhere near 8-30 P.M. Immediately after this people came to the spot hearing the shots or cries, and carried the deceased or assisted him on to the road on the east of the field, put him into a *gharry* which they were able to secure and removed him to a bungalow at a short distance to the south, and there first aid was administered to him. Thence he was removed to the General Hospital. Next morning it was considered necessary to remove him to Dacca in order to localise and trace the bullets and for better treatment. A journey

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by rail was unquestionably risky but it was decided to undertake the risk as it appeared to be the only means of saving his life. He was put into a train, but expired on the way.

That the occurrence took place at or about the time mentioned above and under circumstances which clearly point to the offence as being one of murder are matters about which there can hardly be any doubt or dispute. Nine witnesses have deposed that they came to the spot immediately or shortly after the occurrence on hearing shots or cries from the place. They are P.W. 2, Rai Satish Chandra Sen Bahadur, P.W. 4, Nalini Kumar Choudhury, P.W. 5, Rajani Kanta De, P.W. 6, Biseswar Das, P.W. 7, Dharendra Nath Moitra, P.W. 8, Rasik Chandra Bhattacharja, P.W. 9, H. L. Black, P.W. 10, D. W. N. Coulter and P.W. 12, Pramatha Kumar Das. P.W. 15, Dr. Chatterji the Civil Surgeon has deposed to the injuries revealed on postmortem examination on the body of the deceased and said that they were caused by revolver or pistol shots and pointed to three shots having been fired, and the shots having been fired at close quarters, that is to say, from a distance of not more than two feet. P.W. 23, Mr. Howg, and employee of Messrs. Rodda & Co., on examining the discolouring round the two holes made by the shots in the shirt of the deceased, deposed that the distance of the muzzle of the pistol that fired the shot would be over 3 and less than 18 inches from the shot. Firing shots at such a close range unmistakably indicates intention to cause death. Upon the evidence of P.W. 15, Dr. Chatterji, the Civil Surgeon and also of P.W. 22, Dr. Lees, the Chief Medical Officer of the A. B. Railway, it is clear that the journey to Dacca was undertaken as it was considered to afford the only chance of saving the life of the deceased and there are absolutely no circumstances in the case suggesting that he would not have died if he was not so removed.

The prosecution, in order to fix the guilt on the accused, have adduced evidence, which falls into three groups : (1) Circumstantial evidence by which a motive is sought to be established for the crime. (2) Evidence of witnesses who depose to the hearing of the shots and cries and who say that they came and saw the deceased and that the deceased then and there gave out the name of the accused as his assailant, and (3) the dying declaration of the deceased made before a Magistrate in which the details of the occurrence are given and in which is to be found a declaration alleged to have been made by the accused himself of his motive in taking the steps that he was about to take.

So far as the first of the aforesaid items of evidence is concerned,

the position is this. By an order (Ex. 6) passed by the Deputy Superintendent of police, Chittagong, on the 5th January 1924 Profulla Kumar Roy was deputed to Calcutta to assist in the arrest of four persons, amongst whom was the name of one Ananta Singh. From a Police Report [Ex. 7 (1)] it appears that he arrived at Calcutta on 7th January 1924 and two days later made a report to the effect that he had come to know that the accused Premananda Dutta associated with one Sachindra, a suspect. From entries in Police Diaries (Exs. 7(4), 7(3) and 7(2)) dating from 7th February 1924 to 29th February 1924 it appears that the deceased met the accused during this time, and the latter made appointment with him to meet him which he did not keep and also gave a false address where the deceased was unable to find him. These entries show that the deceased was anxious to be in touch with the accused, but the accused was avoiding the deceased. From the evidence of P.W. 15, Upendra Chandra Ghose a Sub-Inspector of Police and P.W. 16, Tinnatali a Constable it appears that the deceased, while in Calcutta, was watching premises No. 10C, Ward Insitution Street, at Manicktola along with other Police Officers, that they did so for the whole of February and up to the middle of March 1924 and two persons were arrested of whom one was the aforesaid Ananta Singh. It would seem that the object of the watch was to arrest absconders in a case which is described in the evidence as the Chittagong Robbery case in which Ananta Singh was an accused, and that in the course of the search of the aforesaid premises certain explosives were found which resulted in a case which is described as the Manicktola case. Apart from the dying declaration which I shall deal with hereafter and in which the accused is said to have declared that the deceased was a dangerous man for what he had done in the matter of the aforesaid two cases, the only other evidence as to the previous connection between the two is to be found in the deposition of P.W. 11 Shama Charan De, who states that on Saturday the 24th May 1924 at 7 or 8 A.M., in the morning the deceased had asked him to tell the accused that he wanted the latter to meet him that afternoon. This request suggests that it was not an altogether unusual thing that the two would meet. There is also the statement of the deceased contained in his dying declaration that he had met the accused twice or thrice before. The learned Judge pointed out to the jury that the name of the accused was not amongst those the deceased had been sent to Calcutta to enquire about, that there was no connection of a criminal nature proved between Ananta Singh and the accused, and there was nothing else beyond this

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that they were both political suspects, that they were friends and neighbours and both had been seen exercising together in a gymnasium. The learned Judge rightly warned the jury that the evidence referred to above is of little or no value as indicating a motive strong enough to prompt the accused to take the life of the deceased. As the learned Judge put it to the jury the 'cornerstone of the prosecution case regarding motive' is the statement in the dying declaration, to which I have referred and for corroborating which the said evidence is only useful.

Turning now to the second group of evidence, it consists of the testimony of nine witnesses namely, P. W. 2 Rai Bahadur Satis Chandra Sen, P. W. 4 Nalini Kumar Choudhury P. W. 5 Rajan Kanto De, P. W. 6 Bisseswar Das, P. W. 7 Dharendra Nath Maitra, P. W. 8 Rasik Chandra Bhattacharya P. W. 9 H. L. Black, P. W. 10 D. W. N. Coulter and P. W. 12 Pramatha Kumar Das. Of these so far as can be made out from the evidence the first to arrive on the scene were P. W. 5 and P. W. 6 the two Excise peons who came from the house of the Excise Superintendent just on the east of the field and separated from it by a road intervening. Their evidence is to the effect that on hearing shots, after a little delay sufficient to fetch a light, they went to a group of trees, found the deceased lying on the ground there and carried him or assisted him on to the road. P. W. 5 says he asked the deceased what had happened and the deceased replied that Premananda had shot him, that he and P. W. 6 then raised him and asked him "which Premananda?" and the deceased replied, "son of Harish Dutta." P. W. 5 gives practically similar evidence and says that the deceased said "Premananda has shot me, Premananda has shot me," and that as he and P. W. 5 were bringing the deceased along and while still in the field, he i.e. P. W. 6 asked him "which Premananda?" and the deceased replied "Harish Datta's son Premananda." Next came to the spot three witnesses,—the exact order of their arrival being not very clear—P. W's. 4, 7 and 8. These witnesses came from the house of Babu Manaranjan Moitra, the Personal Assistant of the Commissioner, which lies in a south-westerly direction from the alleged place of occurrence. Of these P. W. 4 is a clerk in the Traffic Manager's office of the A. B. Railway, P. W. 7 is a gentleman who had then applied to be enrolled as a pleader and P. W. 8 is the Sadar Kanungoe of Chittagong. They came to the spot and saw the deceased being either raised or helped along towards the road. P. W. 4 says that when he was helping the deceased to go towards the road, when near some low lying

land he said that Premananda had shot him, and that on the road some one asked him "which Premananda?" and he said "Premananda, son of Haris Datta." P. W. 7 says that when the deceased was being taken along he followed the deceased, that the deceased sat down near a gate and then said Premananda had shot him, that he himself did not ask any question, but some one asked the deceased "who is Premananda?", and in answer the deceased said "son of Haris Datta." P. W. 8 gives similar evidence. P. W. 2 appears to have arrived when the deceased was on the road. He is the Government Pleader of Chittagong and his house is to the east on the other side of the road, little to the south of the Excise Superintendent's Bungalow. He says that he found the deceased lying on the road, bleeding and he was very much upset and said "What has happened?" and that the deceased replied that Premananda Datta had shot him. P. W. 9 and P. W. 10 arrived almost together as appears upon the evidence of the former. P. W. 9 is an assistant, of Messrs. Bulloch Brothers and came from his Bungalow which is at some distance to the south, and P. W. 10 is the Town Inspector of Police whose bungalow is on the west of the field. When those witnesses came the deceased was lying on the road. P. W. 9 says that he as well as P. W. 10 asked the deceased the name of the assailant that this they did before the carriage into which he was put for removal to his bungalow, moved on, and that the deceased gave a name which he could not catch. P. W. 10 says that the deceased, when he was in P. W. 9's bungalow gave the name as "Premananda Datta, son of Haris Chandra Dutta." He said the deceased had told him before that he had recognised his assailant and he had then asked for the name, but before the deceased had time to reply he was in conversation with P. W. 9. The last of the witnesses is P. W. 12 who is the Sanitary Inspector of Chittagong and lives in a house behind the house of the Government Pleader. He arrived when the deceased was being helped into the *gharry* in front of the Excise Superintendent's house. He says he went up to the deceased and heard him say "How often must I repeat this," and that he heard the name of Premananda only. The meaning of this last mentioned statement is not very clear. He says he remained beside the carriage till it was taken away, that he did not hear any question put to the deceased as to who his assailant was or his father's name and he did not hear mention of the name of Haris Chandra.

I have set out the evidence somewhat in detail in view of the contention which was put forward in the Court below and which has also been repeated before us to the effect that in view of the

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discrepancies and conflicts that appear in the evidence as to the circumstances attending the mention of the names of Premananda and of his father, it should be held that the deceased did not give out the names or that at any rate it is very doubtful that he did. So far as this question is concerned the chief argument of the defence has been directed to show that there are discrepancies and contradictions as to the exact place or places where the deceased gave the name of the accused or his father. The evidence of these witnesses has also been criticised in respect of other matters as well as that are to be found in their depositions, notably the contradictions between P. W's. 4, 7 and 8 on the one hand and P. W's. 5 and 6 on the other, the latter apparently denying that the former came to the spot when they were helping the deceased to walk up to the road, the conflicts as to the persons who were carrying the lights and the uncertainty suggested by some of them as to whether there were two excise peons or one. On the other hand the witnesses, judging from their position and character, are persons to whom no suspicion of a bias or prejudice can reasonably be attributed. Allowance must be made for the state of their mind, having regard to the suddenness and horror of the crime and the confusion that it naturally caused. On a consideration of all the circumstances and not forgetting at the same time the improbability of every single person coming up to the deceased and making him repeat the name and father's name of the assailant, I think, on the whole it may be safely held that the deceased did in fact give out the name of his assailant and his father's name as well.

It is convenient to deal herewith some of the other arguments which appear to have been advanced on behalf of the defence in the Court below and some of which were also put forward before us as to the naming of the assailant by the deceased at this time. It was argued that the deceased may have been inspired to give out the name, and that it was Inspector Coulter or some other Police Officer who was responsible for the inspiration. As for Inspector Coulter what is suggested in effect is this; that the occurrence took place not at the place where the three trees grow but at a place under a mango tree which is somewhere to the south of the Inspector's bungalow; what basis there is for such a suggestion, I propose to say later on; that he was then helped to go or taken to the place where the three trees grow, and Inspector Coulter's apathy is criticised as suggesting that he had a hand in such removal in the course of which he had an opportunity to put the name into the mouth of the deceased. Reference in

this connection was made to the fact spoken to by him in his evidence that he did not come to the spot till sometime after the occurrence and that he spent ten minutes in getting his rifle out of a box ; and comment has also been made on the fact that he did not display any anxiety to send the deceased to the Hospital. The inference sought to be drawn is hardly justifiable and nothing appears on the record which would suggest that the charge levelled against the Inspector had the slightest foundation in fact. As regards the other police officers, the evidence is sufficiently clear to the effect that one of them P. W. 21 S. I. Benimadhab Chowdhury was not at Chittagong at all on that night and the only two other officers stationed there, namely, P. W. 19 S. I Sarafatulla and P. W. 20 S. I. Sachindra Kanta Bhowmik were at the *thana* when the telephone message gave them the first intimation of the occurrence. Taking into account the evidence of P. W. 22 Dr. Lees and also the other evidence on the record bearing upon this point, there can be no room for doubt that the name had been given by the deceased before these police officers ever came to know of the occurrence. Certain circumstances were pointed out on behalf of the defence to show that P. W. 19 Sarafatulla and P. W. 20 Sachindra Nath Bhowmik were not at the Thana at that hour ; but to my mind, they do not lead to such a conclusion. Reading the evidence as a whole, there can be no doubt that the deceased did give out the name before any interested person could possibly have had any access to him.

This giving out of the name of the assailant however in the peculiar circumstances of the case and in the absence of anything further, would not necessarily show or conclusively prove that the shots were actually fired by the person who was so named. It is an admitted feature of the prosecution case that the deceased and the accused were to meet by appointment. Whatever conflict there is between the dying declaration on the one hand and the evidence of P. W. 11 Shama Charan Dey on the other as to the circumstances connected with this appointment—a conflict to which I shall refer when dealing with the dying declaration itself there can be no question that the deceased was expecting to meet the accused at the Paltan field at about 7 p.m. that evening. P. W. 14 Srikanta Chakravarti, Inspector of Police, says in his evidence that on the date in question at about 6-30 P. M. he went to the Police Club and met the deceased there, that he was with the deceased for 15 or 20 minutes and the deceased then went away after asking him if it was 7 p.m. and on his replying that it was nearly so, and

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that the deceased said he had to go and meet a gentleman. The deceased evidently came to the place and at the hour appointed and if after waiting for some time he came to be shot, it is only natural that regard being had to the character of the man he was there to meet and for whom he was awaiting recognition or no recognition he would name the man as his assailant. It was not a moment when one shot thrice on vital parts of his body, could be expected to calculate and discriminate between what one has seen with his eyes and what one honestly believes as being what must have happened. The name of the accused was uppermost in his mind and it is not unreasonable to hold that situated as the deceased then was he would not find it necessary to make a distinction between the man who had shot and the man who was responsible for the shooting. The evidence of P. W. 2 Rai Bahadur Satis Chandra Sen is to the effect that it was a very dark night, the moon would rise about six hours after sunset and it was a cloudy night, the first part of the night was very dark and one could not identify another person without a light within 2 or 3 feet. There is also a body of evidence on the record that many of the people that came to the spot did not start until they got their lanterns. To my mind therefore the mere fact that the deceased gave out the name and father's name of the accused does not carry the case very far, certainly not far enough to bring the offence home to the accused.

The third item of evidence, to my mind, is the most material one. To that we must look, as affording an adequate motive for the offence, the details of the occurrence and the circumstances which would go to show that the deceased had opportunities to recognize and did in fact recognize his assailant. If this dying declaration can be relied upon, the case becomes a clear one and no reasonable doubt can possibly arise as to the guilt of the accused. So far as the dying declaration is concerned the learned Judge has not clearly dissented from the opinion which the jury formed of it. The foreman of the jury stated "We find that the statements in the dying declaration are vitiated by these having been elicited as a result of question and answer". The learned Judge in his letter of Reference observed with regard to this matter as follows: "The point has been fully discussed in the charge to the jury, and it is a finding against which I am diffident in expressing a contrary opinion." He makes his position quite clear in these words: "I consider it unnecessary to enlarge on this question as my position is that the statements of Profulla Babu to the abovementioned witnesses are sufficient to establish guilt of the accused, and even if

the evidentiary value of the statement recorded by the Sub-divisional Magistrate is impaired or even altogether destroyed by a conviction that it was mainly or entirely the result of leading questions, such a finding cannot alter the fact that those previous statements were made." He thus relies for his recommendation not upon the dying declaration but upon the statements made previously by the deceased to or in the presence of the witnesses. With this, I regret, I cannot agree. As I have said the dying declaration must be referred to for the solution of the difficulties as to motive and as to recognition. The learned Standing Counsel has asked us to rely upon such portions of the dying declaration as may be taken to have been made not in pursuance of any leading question or such portions of it as are corroborated by other evidence. In my opinion a dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable and reject that which is obviously untrue, though to found a criminal conviction on such appraisal of evidence is very often unsafe. As regards a dying declaration, to accept a portion and reject the rest is entirely out of the question; there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon. In the case of a dying declaration which by the law of this country assumes a character very widely different from what it is under the English Law, which is relevant under the Indian Evidence Act whether the person who made it was or was not at the time when it was made, under expectation of death and the weight to be attached to which depends not upon the expectation of death which is a guarantee of its truth, but upon the circumstances and surroundings under which it was made and very much also upon the nature of the record that has been made of it, it becomes almost always a question of fact as to whether it should be relied upon or not. There is high authority for the proposition that "where a statement is not the *ipsissima verba* of the person making it but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence, which it is not desirable should be open in cases in which the person has no opportunity of cross-examination. In the first place the questions may be leading questions and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being freely comprehended. In such circumstances the form of the declaration

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should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the examining Magistrate and how much was the production of the person making the statement" per Cave J. in *R. v. Mitchell* (1). The Sub-divisional officer Mr. Satis Chandra Mazumdar was examined as a witness, being P. W. 3. He stated that such unimportant words on questions as "go on" or "and then", "what else", "on what topic" may have been asked by him. He stated that very few questions and only the unimportant ones were left out. He stated that it was not necessary to put down all questions in recording a dying declaration, and he did not consider it necessary to put down a question "Do you know so and so" or "Have you met so and so." As to certain specific statements he was positive that they were not made in answer to any question of his, and he also said that before the deceased said that Shama Charan was shop-keeper he may have put a question to him to elicit who this Shama Charan was. It is unnecessary to refer to other portions of his evidence. The jury heard him and they had also the record of the dying declaration before them and it was a matter entirely within the province of the jury as to what value they should attach to it. The matter could be left to the jury in no better words than those of the learned Judge "if you consider the statement was elicited as a result of leading questions, that is to say, questions suggesting answers, if you believe this against the words of the S. D. O. then you are bound to regard the statement with the gravest suspicion, to the extent even of refusing to give it any credence at all, because unless such questions are recorded it is impossible for a tribunal sitting in consideration of the evidentiary value of the statement, to assess how much, if any, of it is voluntary outcome of the man's own mind and volition, and how much is the result of such suggestion." The jury, as I have said had the record of the declaration before them. They had also before them the fact proved in this case that before the deceased made the statement, outsiders and Police officers had ample access to him. If therefore the jury were not prepared to rely upon the declaration it is hardly a matter upon which we can dissent from them when dealing with the case under section 307 Criminal Procedure Code.

There are also certain other arguments which have been advanced before us and to them I desire shortly to refer. It is urged on behalf of the defence that the dying declaration is at variance with the other evidence on the record, and it should not therefore deserve

(1) 17 Cox. C. C. 303.

that sanctity which might otherwise attach to it as being the statement of a man who was about to die. In the first place it is pointed out that the deceased spoke of a mango tree as being the tree under which the shots were fired and it is pointed out that the only mango tree there was the one on the south east corner of Inspector Coulter's house, and it is pointed out that the deceased upon his own statement knew the place very well and was hardly likely to make a mistake for the three jungle trees for a mango tree. In support of this point, reference is also made to a passage in the deposition of P. W. 5 who says as follows: "I saw a man run and fall down and another man running away to the north-west. I saw a figure fall and a figure in white running. I did not see actually a man fall. It looked like something falling." It is said that this lends support to the defence suggestion that the occurrence did not take place under the three trees. Next it is said that whereas the deceased said in his declaration that he was sitting under the tree and the accused shot him standing, P. W. 9 Black in his evidence stated that the deceased had told him that the man who shot him was walking with him and talking with him on the golf maidan. It is next said that the statement of the deceased that he met the accused in front of Satis Babu's house at 7 p.m. is falsified by what has been spoken to by Satis Babu and the Excise peons. It is urged that the accused was not in the habit of wearing shoes and in support of that reference is made to the evidence of P. W. 2 and P. W. 9. Comment is also made as to the non-examination of Mr. Kelly, Mr. McKean, Mr. Shallow, the coachman and some other witnesses. It is urged that the place is a much frequented one and also that the Rai Bahadur's horse is groomed there, so that it was not a likely spot to be used either for the crime or for the purpose of sitting on the ground. It is unnecessary to deal separately with these matters. Most of them to my mind present no real difficulty and are easily explicable.

There are however two matters which present some difficulty to my mind. I shall not say that it is altogether an insurmountable difficulty. The deceased said that the day before the accused sent information to him through Shama Charan that he had business with him and had asked him to meet the accused at the spot. In answer to a question as to what Shama Charan told him, he stated "Babu Premananda wanted you to meet him in that place." So there can be no mistake that the deceased meant to convey that the accused sought for an interview with the deceased through Shama Charan and requested him to be at the spot at that hour. P. W. 11

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Shama Charan is equally positive that no such thing took place. He is positive that he had no talk with the accused at any time on Sunday. He says that on Saturday, May 24th, he met the deceased about 7 or 8 a.m. in the morning and the deceased requested him to ask the accused to meet him that afternoon, i.e., on Saturday. There is therefore a conflict which it is hard to reconcile. It may be that a satisfactory explanation of it is obtainable; but there it is and it may have weighed with the jury. The next thing is this. If the accused sought for an interview with the deceased, and came there fully prepared and armed to shoot him to death, would he wait in the way suggested and be conversing with him all the time on various matters and then tell the deceased why it was that he was about to kill him and think it necessary to acquaint him with the fact that he was a dangerous man, that he had caused the Manicktola case to be detected and Ananta Singh arrested and then fire the shots. It is not altogether impossible that such a conversation took place but it is certainly somewhat improbable and may have seemed to be so to the jury.

There remains to notice one further point which the defence sought to make in this case. P. W. II Shama Charan in his evidence stated that he met the accused on the evening of the occurrence at the time of candle light just as the light had been lit. He states that he then met him in front of his shop on the road, and there was a man one Bimal Babu with him, Bimal Babu was pushing a bicycle and the accused was walking slowly beside him. He also states that he met the accused again shortly before or shortly after nine o'clock and that he came from his house towards his shop, and stayed there a couple of minutes. He states further that before the accused came Benoy had come to his shop and purchased some cigarettes and that the accused came and took one from him. It is sought to be shown from this evidence that the accused could not have been at the place of occurrence at the time suggested by the prosecution and that Benoy Babu who was a witness on the charge sheet was withheld by the prosecution. In the absence of any further data it is not possible to appreciate the exact significance of this evidence.

On the whole therefore there were matters before the jury upon which they might have felt themselves unable to convict the accused and I am not prepared to hold that their verdict under the circumstances was an unreasonable one such as would justify our refusal to accept the same. Most of the reasons given by the foreman in support of the verdict may not commend themselves to

us or may not be very convincing but the reasons that the foreman gave need not necessarily be taken as constituting all the grounds which he and the other jurors may have had for their verdict. It is well-known that even trained minds find it difficult when asked off hand to formulate all the grounds which they may have in support of an opinion which they may have formed. After all, what we have got to find before we can refuse to accept the verdict of the jury in a case under section 307 Criminal Procedure Code is that the verdict is unreasonable. In the present case it is not possible to say that the verdict of the seven jurors who sat at the trial was an unreasonable one.

The result is that in my opinion the verdict of the jury should be accepted. The Reference should be rejected and the accused should be released.

Greaves J : I agree.

A., C. R.

Reference rejected.

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APPELLATE CIVIL

*Before Sir Nalini Ranjan Chatterjea, Knight, Judge, and
Mr. Justice Graham.*

JOGENDRA NATH MAITI AND OTHERS

v.

BHAGABAT DAS AND OTHERS.*

Appeal, forum of—Suit for possession and mesne profits prior to suit valued at Rs. 4000—Suit in Subordinate Judge's Court—Suit for possession and mesne profits after ascertainment, found to be more than Rs. 5000.

Where a suit for possession of land with mesne profits prior to the suit was valued at Rs. 4000, and which was instituted in the Court of the Subordinate Judge, but in which the whole amount actually found due, inclusive of mesne profits was Rs. 5100, appeal by any of the parties lies to the High Court and not to the District Judge : *Ijratulla v. Chandra* (1), followed. *Bidyadhar v. Manindra* (2), distinguished.

*Application in Appeal from Original Decree No. 114 of 1925, against the decree of Babu Ashutosh Pal, Subordinate Judge dated the 30th July, 1924.

(1) (1907) I. L. R. 34 Calc. 954 F. B. ; 6 C. L. J. 255 F. B.

(2) (1925) 42 C. L. J. 49 F. B. ; 29 C. W. N. 869 F. B.

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Application by the Defendant.

Suit for possession and mesne profits.

The material facts appear from the judgment.

Mr. Gunada Charan Sen and Babu Someshwar Prosad Mukherjee for the Petitioners.

Mr. Maity (Counsel) and Babu Apurba Chandra Mookerjee for the Opposite Party.

The judgment of the Court was as follows:

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The plaintiffs opposite parties instituted a suit for recovery of possession of land valued at Rs. 2800 and mesne profits tentatively valued at Rs. 1200, the total value being Rs. 4000. A decree was passed for possession with a direction for determination of mesne profits at "a further stage of the suit." The mesne profits were subsequently ascertained and the trial Court gave a decree for Rs. 3116-8 with interest thereon. The defendants appealed to the District Judge while the plaintiffs appealed to this Court valuing their appeal at Rs. 5500. The plaintiffs then applied to the District Judge for dismissal of the petitioners' appeal on the ground that the appeal lay to the High Court and not to the District Judge. While the application of the plaintiffs was pending before the District Judge, the petitioners submitted an application on the 20th July last to us to decide the question of the forum of appeal, and if it was held that the appeal lies to this Court then to treat the application as one under section 5 of the Limitation Act. The application was ordered by this Court to be kept pending until the decision of the question by the District Judge.

The District Judge on the 29th July last held relying upon the Full Bench decision in the case of *Ijyatulla v. Chandra Mohan* (1), that the appeal lies to this Court as the land had been valued at Rs. 2800 and the mesne profits which had been tentatively valued in the plaint at Rs. 1200 had been found to be Rs. 2300, the total being Rs. 5100.

Our attention has been drawn to the case of *Bidyadhar Bachar* (2). That case however related to mesne profits *pendente lite*. In the present case mesne profits were claimed prior to the suit and is thus governed by Full Bench decision in *Ijyatullah's case* (1). It is to be noted that *Ijyatulla's case* (1), was not

(1) (1907) I. L. R. 34 Calc. 954.

(2) (1925) 42 C. L. J. 49; 29 C. W. N. 869.

referred to in the judgment in the later Full Bench decision : *Bidyadhar v. Manindra* (2).

We accordingly hold that the appeal lies to this Court. We think however that there was sufficient cause for not presenting the appeal in this Court in time, and we accordingly direct that the appeal be admitted though out of time. The petitioners however must pay costs to the opposite party one gold mohur.

A. T. M.

Application granted.

(2) (1925) 42 C. L. J. 49 F. B. ; 29 C. W. N. 869 F. B.

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Before Mr. Justice Cuming and Mr. Justice Chakravarti.

TARAPROSAD SAW

v.

MADHU SUDAN GIRI AND OTHERS.*

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June, 8, 9.
July, 29.

Hindu widow—Mortgage—Legal necessity—Burden of proof—Enquiries to be made by creditor—Meeting future expenses of litigation—Necessity for loan brought about by wrongful act of reversioner—Creditor, when discharged of his burden of proof—Money borrowed more than necessity required—Relief.

A creditor of a Hindu widow must prove that legal necessity did exist or that he made proper and *bona fide* enquiries as to the existence of such necessity and satisfied himself by all reasonable means as to its existence. He is not bound to see to the application of the money borrowed when the money was lent for legal necessity : *Kameswar v. Run Bahadur* (1).

The enquiries which a creditor can make is as to the existence of the necessity and also as to the debts she has incurred for a legal necessity and the amount she is in need of for meeting a necessity. It is impossible for a widow to satisfy the creditor as to the actual amount she must borrow for meeting the future expenses of litigations to which she was driven by the reversioner. In such a case the Court should be satisfied that legal necessity existed and that the sum lent was not unreasonably large. The transaction should be shown to be genuine and free

*Appeal from Appellate Decree No. 2298 of 1922, against the decree of G. N. Roy Esq. 2nd Additional District Judge of Midnapore, dated the 28th June, 1922, affirming that of Babu Nitai Charan Ghose, Subordinate Judge, 2nd Court, at Midnapore, dated the 12th January, 1921.

(1) (1880) L. R. 8 I. A. 8 ; I. L. R. 6 Calc. 843.

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from doubts of collusion between the creditor and the widow for raising larger sum than was really needed.

When the main necessity for the loan was brought about by the wrongful act of the reversioner himself, he should not be heard to complain of the high rate of interest more especially when he made no attempt to show that money was available to the widow at a lower rate of interest than was charged in the bond.

Where the existence of the necessities have been established by the creditor and the payment of consideration money is proved, the creditor has *prima facie* discharged the burden which lies on him.

In cases where it is shown that the money borrowed was more than the necessity justified, the Court should find whether the creditor knew or could have known by means of enquiries then available that the money was in excess of the necessity and if the finding is in the affirmative then the Court should allow the reversioner to recover the property on payment of the sum really justified by the necessity. If, on the other hand, the finding of the Court is in the negative, the transaction should be upheld in its entirety: *Deputy Commissioner of Kheri v. Bhayan Singh* (1); *Singam v. Draupadi* (2) and *Ram Dei v. Abu Jafar* (3).

In the absence of fraud or collusion between the widow and the creditor, when the necessity for the loan is established, mere excess of the amount lent should not vitiate the validity of the transaction. When the excess is disproportionately large, that itself is evidence of collusion, then the Court should not uphold the transaction.

In the present case the reversioner, the plaintiff, who drove the lady to the litigation for which the money was borrowed, must show that the sum which the lady borrowed for the necessity which really existed was in excess of the necessity or that there were means available to the creditor for making an enquiry as to the actual amount needed by the lady or that the amount was excessive to his knowledge. The mere fact that the amount borrowed is to some extent larger than the sum actually needed ought not to vitiate the mortgage.

In cases where the Court finds that the necessity was inadequate for the entire loan, the reversioner should be put to terms. The decree for possession should be subject to payment of the sum paid to the widow without interest, the usufruct of the property being set off against the interest.

Appeal by Defendant No. 1.

Suit for declaration of title.

The material facts appear from the judgment.

Babu Santosh Kumar Pal for the Appellant.

Babu Apurba Charan Mukerji for the Respondents.

C. A. V.

The judgments of the Court were as follows :

(1) (1907) E. R. 34 I. A. 72; I. L. R. 29 All. 331; 5 C. L. J. 344.

(2) (1907) I. L. R. 31 Mad. 153.

(3) (1905) I. L. R. 27 All. 494.

Chakravarti, J :—The suit out of which this appeal arises was brought by the reversionary heir of one Govinda Giri on the death of his widow Kausalya in the year 1916 for a declaration that the defendant No. 1 had acquired no title by his purchase at the sale in execution of a mortgage decree against the widow.

The facts shortly stated are these. One Govinda Giri died in the year 1868 sonless leaving a widow Kausalya ; she lived with Govinda's cousin Tulsaram who was her next reversioner, in her husband's house but Tulsaram drove her away from her house in the year 1891. She brought a suit against Khirode grandson of Tulsaram and recovered a decree for the share of the land which was left by her husband and it appears that in that suit she was assisted by the present plaintiff and his brothers who were the sister's sons of Govinda.

In execution of a decree for mesne profits against Khirode she purchased Khirode's half share in 1896, and was since then in possession of the entire property consisting of 20 bighas 2 cottahs and 13 chittaks of land. But she was again disturbed in her possession by the present plaintiff and his brothers and was dispossessed of 7 bighas out of 10 bighas of lands which were left to her after she had sold other lands. Then she brought a suit for possession of those 7 bighas against the present plaintiff and his brothers in 1908 and obtained a decree for possession on the 8th December of that year.

Now it appears, that Kausalya mortgaged the lands in suit for Rs. 500 in favour of the defendant No. 1 in the *Benami* of one Harnarain on the 25th Sraban 1314 B. S. and then a 2nd bond was executed by her in favour of Taraprosad defendant No. 1 for Rs. 795 on the 13th Magh 1315 B. S. and out of the money so borrowed the money due under the 1st bond was paid. Taraprosad obtained a mortgage decree on compromise against Kausalya in August 1909 and the mortgaged properties were sold in execution of the mortgage decree. This is the sale which the plaintiff challenges in this suit as not binding on him.

On the death of Kausalya Madhu Sudan Giri the only surviving son of Govinda's sister brought this suit as the reversionary heir of Govinda Giri for recovery of possession of the lands sold in execution of the mortgage decree on the allegation that the defendant No. 1 and No. 2 had kept him out of possession of the lands without any right.

The defendant No. 1 contested the suit and his main defence was that the mortgages in his favour were executed by Kausalya

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for legal necessity and therefore the sale thereunder binds the plaintiff, the reversionary heir, and he further contended that half share of the properties which Kausalya purchased in execution of her decree against Khirode was her Stridhan property to which the reversioner had no claim as it was sold in execution of a decree against Kausalya.

The Court of first instance found that there was legal necessity for a portion of the money advanced by the defendant No. 1 but decreed the suit holding that the defendant No. 1 was like a mortgagee in possession and as he had rendered no account of the rents and profits he could claim no right to retain possession against the plaintiff.

On appeal by the defendant No. 1 the Additional District Judge affirmed the decree of the Munsiff and dismissed the appeal although he found that the amount for which legal necessity was established was larger than the amount found by the learned Munsiff. The defendant No. 1 has preferred this second appeal against the decree of the Additional District Judge.

Before I deal with the main question as to whether the learned Additional District Judge has properly applied the principle which applies to a case of legal necessity for alienation by a Hindu widow I shall refer to some of the salient facts which have been found by the Court below.

Kausalya inherited about 10 bighas of land left by her husband and led a peaceful life till she was dispossessed by Tulsaram in the year 1891. She was then plunged in litigation on account of dispossession by her then reversionary heir and it was in 1894 that she recovered a decree for possession and she was again dispossessed by the present plaintiff at about that time. The learned Munsiff to quote his own words found that "Kausalya Bewa got possession of a half share after April 1894, and of the remaining half share after 1896. She was however not allowed by her husband's nephew to be in peaceful possession of the entire land for any long time. She was dispossessed from 7 bighas out of the 10 bighas that was left to her."

In 1908 the present plaintiff asserted in the suit brought by Kausalya against him and others that she was in possession of only 3 bighas of land and they were in possession of 7 bighas from 1896 down to 1908. The mortgage bonds in favour of the defendant No. 1 were executed in 1907 and beginning of 1909. It is clear therefore that before the mortgages she had in her possession only 3 bighas of land even after she had recovered the land from Khirode and

she had to carry on litigation with the plaintiff for the recovery of the 7 bighas in his hand, and she obtained her decree in 1908. It is quite clear therefore that she was kept out of possession of her lands successively by her reversioners. The plaintiff himself kept her out of possession for about 12 years when she executed her first mortgage bond in favour of defendant No. 1. The legal necessities for the sum of Rs. 500 covered by the bond of 1907 were 1st Rs. 130 for payment of earlier debts due under a mortgage which was satisfied by defendant No. 1, and Rs. 370 taken in cash were said to have been spent :—1st, to meet the expenses of litigations both criminal and civil. 2nd Medical treatment. 3rd Pilgrimage to Gaya. 4th. Payment of arrears of rents.

The 2nd bond which the defendant No. 1 took was for Rs. 795 out of which Rs. 220 were paid in cash and the balance went in satisfaction of the previous bond. The creditor therefore has to establish the legal necessity for Rs. 220 paid in cash. Now the learned Additional District Judge has found that when the 1st bond was taken Kausalya had been dispossessed of the major part of her lands but has taken no notice of the helpless condition in which the woman found herself on account of the conduct of her reversioners, the plaintiff being one of them. The learned Additional District Judge has found that all the items of legal necessities except the 4th item did exist but has assessed the amount of such necessities according to his own view as to the amounts which ought to have been spent for the necessities so found.

The total expenses for which the estate was legally chargeable according to the learned Judge amounted to Rs. 350.

Agreeing with the Munsiff that as the defendant No. 1 was in possession of the land and had not accounted for the rents, profits thereof the plaintiff should get a decree for possession, the learned Judge dismissed the appeal.

The points urged in this appeal are 1st : That the Courts below have erred in holding that the defendant No. 1 the creditor was bound to show what the actual amount spent by the widow was.

2ndly : That the Court of appeal below was in error in holding that the creditor was entitled to credit not for the sum actually spent but which according to the decision of the Court ought to have been spent by the widow.

3rdly : That the Court below having found that legal necessity for the loan existed should not have passed an unconditional decree

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for possession without directing a refund of the money found to have been borrowed for legal necessity.

We think that the judgment of the learned Additional District Judge is vitiated by the erroneous principles which he has applied in the decision of this case.

It is now well settled that a creditor as in this case must prove that legal necessity did exist or that he made proper and *bona fide* enquiries as to the existence of such necessity and satisfied himself by all reasonable means as to its existence.

The creditor is not bound to see to the application of the money borrowed by a widow when the money was lent for legal necessity ; see *Kameswar Prosad v. Run Bahadur* (1). On the question of *bona fide* enquiries by the defendant No. 1 the learned Judge says "I am not satisfied that the defendant acted *bona fide*." Then the learned Judge gives his reasons for this view. He thinks that the criminal case could not require Rs. 110 and the kabiraj who treated Kausalya was not so highly qualified as to deserve a fee of Rs. 50 although the kabiraj swore that he did receive that sum as his fees. The enquiries which a creditor can make is as to the existence of the necessity and also as to the debts she has incurred for a legal necessity and the amount she is in need of for meeting a necessity. It is impossible for a widow in the position of Kausalya to satisfy the creditor as to the actual amount she must borrow for meeting the future expenses of litigations to which she was driven by the plaintiff himself. In a case like this the Court should be satisfied that legal necessity existed and that the sum lent was not unreasonably large. The transaction should be shown to be genuine and free from doubts of collusion between the creditor and the widow for raising larger sum than was really needed. The interest of the reversioner should no doubt be protected but at the same time the widow should not be hampered by unreasonable restrictions in raising money when legal necessity exists.

The learned Judge observes that the interest was high but does not take into account the risk which the creditor took and the helpless condition in which the widow was. When the main necessity for the loan was brought about by the wrongful act of the reversioner himself he should not be heard to complain of the high rate of interest more especially when he made no attempt to show that money was available to the widow at a lower rate of interest than was charged in the bond.

(1) (1880) L. R. 8 I. A. 8.

The existence of the necessities have been established by the creditor and as the learned Judge does not find that the consideration money was not paid, the creditor in a case like this has *prima facie* discharged the burden which lay on him.

After finding that the legal necessities alleged by the creditor did exist both Courts enquired not as to what was the money actually needed or was spent by the widow but as to what she ought to have spent. For instance in trying the question as to what was the amount necessary for the litigation to which the lady was driven by the plaintiff, the learned Judge takes the amount allowed to her in the decree which she eventually got against the plaintiff for possession of the land as the sum needed for litigation. Every one acquainted with the costs of litigation in this country knows that the actual amount which a successful litigant gets as costs allowed by the Courts is much less than the actual amount spent by him.

In cases where it is shown that the money borrowed was more than the necessity justified then the Court should find whether the creditor knew or could have known by means of enquiries then available that the money was in excess of the necessity and if the finding is in the affirmative then the Court should allow the reversioner to recover the property on payment of the sum really justified by the necessity. If on the other hand the finding of the Court is in the negative, the transaction should be upheld in its entirety. In this connection see the cases of *Deputy Commissioner of Kheri v. Bhayan Singh* (1); *Singam v. Draupadi* (2); *Ram Dei v. Abu Jafar* (3).

In the circumstances of the present case the reversioner, the plaintiff who drove the lady to the litigation for which the money was borrowed must show that the sum which the lady borrowed for the necessity which really existed was in excess of the necessity or that there were means available to the creditor for making an enquiry as to the actual amount needed by the lady or that the amount was excessive to his knowledge. The mere fact that the amount borrowed is to some extent larger than the sum actually needed ought not to vitiate the mortgage. It is impossible to draw a line as to what extent an excess should be held not to vitiate the transaction. In the absence of fraud or collusion between the widow and the creditor, when the necessity for the loan is established, mere excess of the amounts lent should not be held to vitiate the validity

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(3) (1905) I. L. R. 27 All. 494.

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of the transaction. When the excess is disproportionately large, that itself is evidence of collusion then the Court should not uphold the transaction. In cases where the Court finds that the necessity was inadequate for the entire loan, the reversioner should be put to terms. The decree for possession should be subject to payment of the sum paid to the widow without interest, the usufruct of the property being set off against the interest. The lower appellate Court was in error in treating the defendant No. 1 as a mortgagee in possession and in awarding an unconditionnal decree for possession to the plaintiff.

The judgment and decree of the lower appellate Court are set aside, the case sent back to that Court so that the appeal may be reheard in the light of the above observations. The appellant is entitled to the costs of this appeal, the other costs will abide the result.

Cuming, J:—I agree.

A. T. M.

Appeal allowed : Case remanded.

*Before Sir Ewart William Greaves, Knight, Judge, and
Mr. Justice Chakravarti.*

INDU BHUSAN BOSE

v

ATUL CHANDRA BISWAS AND OTHERS.*

CIVIL.

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November, 26.

Landlord, right of—Tenant encroaching on land.

If a tenant had encroached upon any land and made it a part of his tenancy, he is bound to give that up to his landlord at the determination of his tenancy.

Appeal by the Plaintiff.

Suit for recovery of possession.

The material facts appear from the judgment.

*Appeal from Appellate Decree No. 1251 of 1922, against the decree of M. C. Ghosh Esq, District Judge of Jessore, dated the 16th February, 1922, modifying that of Babu Ravindra Nath Dhar, Munsiff, 1st Court, at Magura, dated the 5th January, 1921.

Dr. Jadu Nath Kanjilal and Babu Surendra Chandra Sen
for the Appellant.

Dr. D. N. Mitter and Babu Surendra Nath Bose (Sr) for the
Respondents.

The judgments of the Court were as follows :

• **Chakravarti, J :** This is an appeal by the plaintiff and arises out of a suit brought by the plaintiff against a number of defendants for possession of 90 plots of land on the allegation that they appertain to his towji of which he is an ijaradar under the patnidar of towji No. 203. The defendants are numerous. Defendants Nos. 1 to 3 are said to be the legal representatives of one Sarala Sundari who held a tenancy under the owners of the plaintiff's towji at a jama of Rs. 50 which was subsequently reduced to Rs. 30. Defendant No. 4 is said to be a patnidar of a neighbouring towji No. 2498. Defendant No. 5 is alleged to be one of the co-patnidars with defendant No. 4 who, we are told, has disclaimed his right as a patnidar. Defendants Nos. 6 to 9 are zamindars of towji No. 2498. I should have stated that defendants Nos. 1 to 3 also claim to be tenants under the proprietors of towji No. 2498. The other defendants are either tenants of defendants Nos. 1 to 3 or defendant No. 4 or defendants Nos. 6 to 9. It is not necessary for the purpose of this appeal to go into details of the cases of various defendants. It appears that the main defence in the case was that the lands in suit did not appertain to towji No. 203 and did not appertain to the tenancy of Sarala Sundari the predecessor of defendants Nos. 1 to 3. The plaintiff's case further was that towji No. 203 was let out in a patni so far back as 1891, that the patni was purchased by the plaintiff in 1902 and that the patni having been transferred to the Jessore Loan company, the plaintiff took an ijara for 99 years from the said company. The plaintiff further alleged that the tenancy which I have mentioned before held by Sarala fell into arrears of rent and a decree was obtained by the plaintiff and the tenancy was sold on the 15th of July 1907. The plaintiff took symbolical possession on the basis of his purchase and he was dispossessed from the land by the defendants in February, 1908. The present suit was brought in 1919 well within 12 years of the date on which the plaintiff took symbolical possession as against defendants Nos. 1 to 3. As I have already stated, the main defence was whether the land appertained to towji No. 203 or to the neighbouring towji of defendants and also whether the lands were covered by the lease of Sarala. It appears that the Munsiff directed a local investigation for the purpose of ascertaining whether the lands did appertain to the

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plaintiff's towji or outside it, and also for the purpose of ascertaining the boundaries of the jote held by Sarola. The commissioner reported that in the absence of a correct thak map and in the absence of field books of the thak, it was not possible to ascertain definitely whether the lands appertained to towji 203 or not. It seems to have been admitted in the Court of first instance that three plots of land really appertained to the tenancy of Sarola. Numerous plots were given up by the plaintiff in the course of the trial and so far as I can gather, the number of the plots was ultimately reduced to about 55. The decree of the first Court was confined to the three plots in favour of the plaintiff and the rest of his claim was dismissed. On appeal to the District Judge by the plaintiff, the learned Judge agrees with the Munsiff as regards the plots which had been decreed in favour of the plaintiff. As regards the other plots the learned Judge says that it was argued before him on behalf of the plaintiff that the plaintiff's claim really was based upon his claim to towji 203 so far as the tenancy of Sarola was concerned that having been sold was wiped out and therefore whether the lands appertained to the jote of Sarola or not, so far as they appertained to towji 203, they could be her property as owner of towji 203. The learned District Judge in discussing that view of the case says that the plaintiff claimed all lands which appertained to towji 203 beyond those which were covered by the lands of Sarola on the ground that defendants Nos. 1 to 3 must have been in possession of those lands of towji 203 by their encroachment as tenants under the plaintiff of the waste lands or unoccupied lands of the plaintiff within towji 203; and therefore if the plaintiff could establish that the lands did appertain to towji 203 the defendants were bound to give the lands back which they held by encroachment after the determination of the tenancy held by their predecessor. The learned District Judge after discussing the authorities came to the conclusion that if the plaintiff had established that those lands were held by defendants Nos. 1 to 3 and those who claimed under them on the ground that they had encroached upon those lands, then all that the plaintiff would be entitled to would be merely a decree for rent for the encroached lands because the tenants when the tenancy continued had acquired a title by adverse possession of a limited interest as tenants. In that view the learned District Judge refused to direct a local investigation which, it appears, he was inclined to grant, if any useful purpose would have been served by a further investigation, because in one part of his judgment the learned District Judge thought that the report of the commissioner

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would be no safe guide for the determination of the question as to whether the lands were within the touji 203 or towji 2498, because the thak map was not supported by field books ; but it appears that at the trial before the District Judge the field books were produced by the defendants themselves and partly by the plaintiff and therefore there were materials upon which a proper investigation was possible. But as we have already stated the learned District Judge appears to have refused to direct a further investigation because he thought that the plaintiff would not be entitled to a decree for *khas* possession. In that view the learned District Judge dismissed the plaintiff's appeal who has now preferred this second appeal to this Court.

In support of this appeal it was contended by the learned vakil for the appellant that the view taken by the learned District Judge as to the rights of the plaintiff as regards the encroachment made by the tenant upon the waste land of the landlord, the tenant's right to resist *khas* possession on the determination of the tenancy was wrong and for the ends of justice the case should be sent back for investigation by a commissioner as to whether the lands did appertain to one towji or the other. Dr. Mitter who appeared for the defendants pointed out to us that there was a difference as to the defence raised by the various defendants ; but we cannot at this stage go into that question. The learned District Judge disposed of the case on the view that the case related so far as the lands of towji 203 were concerned only between the plaintiff and the defendants who claimed through Sarola. We think that the view expressed by the learned District Judge as to the right of the plaintiff as to the encroached lands after the determination of the tenancy is not correct. In fact Dr. Mitter frankly admitted that the general law that after the determination of a tenancy if a tenant had encroached upon any land and made it a part of his tenancy he is bound to give up those lands to his landlord at the determination of his tenancy. We think upon this ground that the decision of the learned District Judge should be set aside and that he should be directed to order a local investigation by a competent commissioner to determine the question upon the materials on the record or upon fresh materials to be supplied, to determine how far the lands in suit appertained to towji 203. So far as the lands which fell within towji 203 and are in the possession of defendants Nos. 1 to 3 or in the possession of any one claiming through defendants Nos. 1 to 3, the plaintiff would be entitled to a decree for possession of those lands. We do not here discuss or determine any question

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or issue which any of the defendants might raise in the Court below on a title apart from the title of a tenancy held by Sarola. After the local investigation and after the determination of what lands fell within towji No. 203, the learned District Judge will dispose of all the issues which may be raised before him in view of the observations which I have made above.

I need hardly add that this remand only affects the plots which the plaintiff did not abandon.

Costs will abide the result.

Greaves J : I agree.

The Court then passed the following order :

The appeal has abated against defendants Nos. 10, 20, 40, 44, 48, 55 and 58 named in the affidavit filed in Court on 26th November 1924 and stands dismissed as against their heirs.

A. T. M.

Appeal allowed : Case remanded.

*Before Sir Nalini Ranjan Chatterjea, Knight, Judge, and
Mr. Justice Panton.*

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8, 9, 12, 13, 14, 15,
16, 22, 23, 26, 27,
28.

February, 2, 3, 4,
5, 6, 9, 10, 11, 12,
13, 16, 17, 18, 19,
20, 23, 24, 25, 26,
27.

March, 2, 3, 4, 5,
6, 9, 11, 12, 13, 16,
17, 18, 19, 20, 23,
24, 25, 26, 27, 30,
31.

April, 1, 2, 3, 6, 7,
8, 9.

August, 17.

RANI PRAYAG KUMARI DEBI AND OTHERS

v.

SIVA PROSAD SINGH.*

Impartible estate—What constitutes separation—Burden of proof—Presumption of separation—Evidence of separation—Subsequent statement—Intention to separate—Asserting greater right—Maintenance—Document, production of, at a late stage—Discretion of Court—Civil Procedure Code (Act V of 1908), O. 13, R. 1—Junior member, if by agreement, give up his right—Junior member's right to maintenance—Right based on custom, if indicative of jointness—Perpetual grant—Khorposh grant—Execution of will by competent testator—Presumption—Contents of will—Will, not probated, if can be used for collateral purpose—Indian Succession Act (X of 1865) Secs. 187, 265, 266—Admissibility in evidence—Statement of

*Appeals from Original Decree Nos. 194 of 1921 and 51 of 1922, against the decree of Babn Nalini Kanta Bose, Subordinate Judge, 1st Court, of 24 Perganas, dated the 3rd November, 1921.

deceased as regards successor—Evidence Act (I of 1872), Sec. 32—Succession—Survivorship—Evidence Act, Sec. 44—Decree obtained by fraud—Suit, if necessary to set aside—Family custom—Proof—Income of impartible estate or properties acquired therewith, nature of—Mining lease—Crediting rents to account books and treating as part of income of estate, if makes impartible—Movable property, if can be incorporated with immovable property—Incorporation—Unrealised rent, if appertains to original property—Holder of impartible estate, interest of—Value of movable properties not ascertained—Defendant objecting in appeal—Procedure for appellate Court—Successor, meaning of—Cause of action—Subsequent realisation of money—Executor de son tort—Applicability to Hindus—Person settling up a title paramount—Will not proved—Legacies charged on estate, if can be enforced—Action for administration, who can bring—Defendant in wrongful possession—Defendant not sued as executor de son tort—Defendant's liability—Indian Succession Act, Sec. 266, if exhaustive—Executor, if trustee—Trust, how enforced.

With regard to impartible property of a family governed by the Mitakshara school of Hindu law, where it is not the self-acquired separate property of any member, but is the ancestral property of the family, the decision on the question what constitutes separation so far as the impartible estate is concerned, is not uniform. *Ckondhry Chintamun v Mussumat Nowlukho* (1) is an authority for the proposition that even though the general status of the family be divided, there may be jointness with respect to the impartible estate unless there is renunciation by the junior members. But in the *Telwa case* (2) and in the *Serampore case* (3) it was held that the question of the general status of the family, namely, whether there was separation in mess, worship or estate, was to be considered.

The junior members of the family by an agreement may give up their rights to the impartible estate just as they may do with respect to partible property.

In the case of impartible estates, the fact that the junior members are residing or messing separately, does not necessarily raise a presumption of separation though taken along with other facts it may do so. The question of *onus* of proof depends upon how far the facts are admitted by each side.

Although a subsequent statement may be taken as evidence of separation having taken place long before, other evidence of subsequent acts and conduct are to be taken into consideration.

Asserting rights by a junior member of the impartible estate in excess of what he has in the *Khorposh* mouzas, as setting up of permanent rights in the *Khorposh* mouzahs, by itself, will not show an intention to separate. If the deed itself recited that it was a maintenance grant, there is no repudiation of the interest of the impartible estate holder : *Serampore case* (3) ; *Sri Raja Viravara v. Sri Raja Viravara* (4).

(1) (1875) L. R. 2 I. A. 263.

(2) (1915) L. R. 42 I. A. 192 ; I. L. R. 42 Calc. 1179 ; 22 C. L. J. 498.

(3) (1922) L. R. 50 I. A. 1 ; 37 C. L. J. 287.

(4) (1897) L. R. 24 I. A. 118 (126) ; I. L. R. 20 Mad. 256.

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Order 13 rule 1 of the Code of Civil Procedure does not exclude the discretion of the Court to receive any documentary evidence in the possession of a party on which he intends to rely, at any subsequent stage : *Imambandi v. Mutsaddi* (1). An appellate Court should not interfere with this discretion unless it has been capriciously exercised : *Biswanath v. Kalicharan* (2).

In an ordinary joint Mitakshara family the junior members have an interest accruing by birth in ancestral property, and such interest carries with it a right to maintenance until partition is effected. Such a right is a real right and can be enforced against a stranger. In an impartible estate, however, the junior members do not acquire an interest by birth.

The junior members in an impartible estate may have right to maintenance under the law. This was recognised before *Sartaj Kuari's case* (3) but negatived in later cases, viz, *The Second Pittapur case* (4) and the *Joypore Case* (5). These cases lay down that there is no right of junior members to maintenance apart from custom and apart from special texts and personal disqualification. This view was modified in *Baijnath's Case* (6).

Even if the junior members have no right to maintenance under the law, they have such right under custom : *The Second Pittapur Case* (4).

If a junior member's right to maintenance is based upon law, his receipt of maintenance shows jointness.

An impartible estate is a creature of custom, and the right of junior members to maintenance is also under the same custom. Custom has origin in an agreement by which the members agree that one of them (the eldest) in certain order of succession should hold the estate, the other members being entitled to maintenance : *Rao Kishore v. Gahenbhai* (7).

An impartible estate is by its very nature incapable of common enjoyment or being the subject of co-ownership, and in that sense there can be no jointness in estate. But the receipt of maintenance (whether under the law or under custom) may, in the absence of other circumstances, be the only mode in which jointness in estate (in a limited sense and in so far as is consistent with an impartible estate) be kept up in an impartible estate. A mere receipt of maintenance in all circumstances is not sufficient to constitute jointness ; it indicates jointness.

When a grant for maintenance is made to a junior member of an impartible estate, it is *prima facie* an intention that the gift should be for life : *Rameshar v. Arjun* (8), and other cases.

If a grant for maintenance to a junior member of an impartible estate is perpetual, it is in excess of his right and may indicate an intention to separate the junior member from the family.

(1) (1918) L. R. 45 I. A. 73 (80-81) ; I. L. R. 45 Calc. 878 ; 28 C. L. J. 409.

(2) (1916) 27 C. L. J. 119 (120-122).

(3) (1887-88) L. R. 15 I. A. 51 ; I. L. R. 10 All. 272.

(4) (1918) L. R. 45 I. A. 148 ; 28 C. L. J. 428.

(5) (1919) 29 C. L. J. 528 ; 24 C. W. N. 226.

(6) (1921) 33 C. L. J. 388 ; 25 C. W. N. 564.

(7) (1919) 24 C. W. N. 601.

(8) (1900) L. R. 28 I. A. 1 ; I. L. R. 23 All. 194.

A *khorphosh* grant may be made to a junior member in recognition of his right to maintenance (whether under the law or under a custom) as a member of the family, and in such a case there is not a complete separation.

In all cases of *khorphosh* grants, there is always the possibility of reversion to the parent estate on the extinction of heirs of the grantee.

Ordinarily the execution of a will by a competent testator raises the presumption that he knew and approved of the contents of the will, if nothing appears to the contrary.

A will not proved in the Probate Court may be cited in evidence for purpose of showing the intention of the testator with regard to his estate.

Section 187 of the Indian Succession Act, which is incorporated in the Hindu Wills Act, does not debar the use of a will in evidence for a purpose other than the establishment of a right as executor or legatee.*

A statement made by deceased as to person who will be his successor in case of his not having a son, is inadmissible in evidence under section 32 of the Evidence Act.

The rule of survivorship applies to succession in ancestral impartible estates.

Mere non-service of summons in ordinary cases is not sufficient to constitute fraud.

A party to a suit can, under section 44 of the Evidence Act, show that a decree obtained by opposite party against him in another suit was obtained by fraud, and it is not necessary for him to bring an independent suit for setting it aside : *Rajib v. Lakhan* (1).

Evidence showing exercise of a right in accordance with an alleged custom as far back as living testimony can go, raises the presumption though only rebuttable one, as to the immemorial existence of the custom, and, if the existence of the custom has been proved for a long period, the onus lies on the person seeking to disprove the custom to demonstrate its impossibility : *Mahamaya Yari-das* (2) and other cases.

Income of an impartible estate or properties acquired therewith, is absolute property of the owner of an impartible estate : *Rani Jagadamba v. Narain* (3) and other cases.

In the case of an impartible estate, the holder is the owner both of the impartible estate as well as its income. If the owner does not dispose of the estate but converts a portion of it into money, it is no longer a part of the impartible estate. The money to which it is converted is freed from the rights of junior members whatever they may be, and becomes the absolute property of the holder of the estate, unless the money or property is incorporated with the estate.

Monies received on account of mining leases, or royalties from mining com-

*[See *Achyutananda v. Jagannath* (1914) 21 C. L. J. 96; *Sarvasari* (1915) I. L. R. 42 Calc. 953—Rep.].

(1) (1899) I. L. R. 27 Calc. 11.

(2) (1914) I. L. R. 42 Calc. 455; 20 C. L. J. 183.

(3) (1922) L. R. 50 I. A. 1; 37 C. L. J. 287.

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pensation under the Land Acquisition Act at the best stand on the same footing as sale, and junior members cannot have any right to any of them.

The mere fact that rents are credited to the account books of the estate or treated as part of the income of the estate is not sufficient to affect the property with the character of impartibility: *Serampore case* (1).

There can be no incorporation of movable properties with an impartible estate. In order that there may be incorporation, the property to be incorporated must be of the same nature as the immovable property.

Incorporation involves altering the ordinary course of succession.

The produce of an impartible estate does not necessarily belong to and form an accretion to the original property. Rent which has become due during the lifetime of the holder of an impartible estate is produce of the impartible estate whether the produce has actually come into the hands of the owner or not: *Aparna Devi v. Shiba Prasad* (2).

The interest of the holder of an impartible estate is not analogous to that of a Hindu widow. The holder has absolute power of disposal over the estate.

When the values of movable properties were disputed by the defendant in the written statement and an issue was raised on the point, the Court should not accept values given in the plaint without any evidence, and if it accepted the values given in the plaint and the defendant raises a question in appeal, the appellate Court can order that proper procedure should be followed.

'Successor' does not necessarily mean 'Successor by survivorship.'

When the suit is for recovery of impartible estate as well as other properties movable and immovable, of which the defendant is said to have been in wrongful possession, there is only one cause of action, namely, the withholding of all those properties by the defendant and will include the monies realised subsequent to the death of the last holder of the impartible estate and prior to the institution of the suit.

One who is neither executor nor administrator intermeddles with the goods of a deceased, or does any other act characteristic of the office of executor, he voluntarily makes himself what is called in law an executor of his own wrong or voluntarily an executor *de son tort*. A very slight circumstance of intermeddling with the goods of the deceased will make a person executor *de son tort*. (3).

The doctrine of executor of his own wrong in the law of wills introduced in sections 265 and 266 of the Indian Succession Act, is applicable to cases not governed by that Act on general principles of equity and good conscience even though similar provisions have not been introduced into the Probate and Administration Act: *Rajah Parthasarathy v. Rajah Venkatachari* (4).

However, a person set up in himself a colourable title to the goods of the deceased though he may not be able to make out his title completely, he shall not be treated an executor *de son tort*: *Flemings v. Farret* (5) and *Rajah Parthasarathy v. Rajah Venkatachari* (6) but the claim must be *bona fide*;

(1) L. R. 50 I. A. 1; 37 C. L. J. 287. (2) (1924) I. L. R. 3 Pat. 367. (3) *Maxims on Executors*, 11th. Ed. Vol. I. p. 177.

(4) I. L. R. 46 Mad. 190 (232-33). (5) (1794) 1 Esp. N. P. C. 336.

(6) I. L. R. 46 Mad. 190 (228-29).

so also if he takes the goods of the deceased by mistake supposing them to be his own, this will not make him executor of his own wrong.

If a person claims a title not derived from the testator but a paramount title he does not make himself liable as an executor *de son tort*.

Unless a will is proved in the Probate Court, the legacies cannot be enforced against the estate, even though they are charged upon it.

An action for administration, which means that the legacies and debts have to be paid off, may be brought by the next of kin.

Where the plaintiffs alleged in the plaint that there was no will but that the defendant was in possession and that his possession was wrongful and the defendant, on the other hand, said that there was a will, and if he had in fact intermeddled with the estate :

Held, that it was sufficient to hold the defendant liable as executor *de son tort* although he was not sued as executor *de son tort* : *In re Lovett* (1).

Section 266 of the Indian Succession Act is not exhaustive ; it deals with some of the liabilities and does not deal with all the rights and liabilities of an executor *de son tort*.

A person who takes possession of or intermeddles with the estate of a deceased person without being appointed an executor is an executor *de son tort*, and is liable both under the Hindu and English law : *Magaluri v. Narayana* (2) and *Kanakamma v. Venkataratnam* (3).

An executor though not a trustee for specific purpose (under section 10 of the Limitation Act) is a trustee with a fiduciary character even as regards the next of kin : *Kherodemoney v. Doorgamoney* (4) and *Greender v. Mackintosh* (5).

Trusts are enforced not only against persons who rightfully are possessed of the trust property as trustees, but also against all persons who came into possession of the property bound by the trust with notice of the trust, and whoever so comes into possession is considered as bound with respect to that special property to the execution of the trust : *Adair v. Shaw* (6).

Appeals by Plaintiffs in No. 194 and by Defendant in No. 51.

Suit for recovery of possession of the Jheria Raj on declaration of the plaintiffs' right by inheritance thereto.

The material facts appear from the judgment.

Mr. N. N. Sircar, Babus Nagendra Nath Bose, Pramatha Nath Bandopadhaya, Rama Prosad Mukhopadhaya and Mr. N. C. Chatterjee for the Appellants in No. 194 and for the Respondents in No. 51.

(1) (1876) L. R. 3 Ch. D. 198. (205) ; 45 L. J. Ch. 768 ; 35 L. T. 93 ; 24 W. R. (Eng). 982.

(2) (1881) I. L. R. 3 Mad. 359 (363 and 365).

(3) (1884) I. L. R. 7 Mad. 586.

(4) (1878) I. L. R. 4 Calc. 455 (469) ; 3 C. L. R. 315.

(5) (1879) I. L. R. 4 Calc. 897 (924) ; 4 C. L. R. 193.

(6) (1803) 1 Sch. & Lef. 254 (262).

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Mr. S. R. Das (Advocate-General), Dr. D. N. Mitter, Babus Romesh Chandra Sen, Krishna Lal Banerjee, Krishna Chaitanya Ghose and Promotha Bhusan Dutt Chaudhuri for the Respondent in No. 194 and for the Appellant in No. 51.

C. A. V.

The judgment of the Court was delivered by.

N. R. Chatterjea: This appeal arises out of a suit for recovery of possession of the Jheria Raj, an impartible estate on declaration of the plaintiff's right by inheritance thereto.

The last male owner was Raja Durga Prasad Singh and the 3 plaintiffs are his widows. Raja Durga Prosad was the grandson of Raja Udit, and the defendant was the grandson of Nanda Kishore. Raja Udit, Nanda Kishore, and Brojo Lal were the sons of Raja Sangram.

The plaintiff's case shortly stated, was that Nanda Kishore and Brojo Lal (and their branches) were entirely separate in food, worship and estate from their elder brother Raja Udit and his successors, that the Jheria estate thus being the separate estate of Raja Durga Prosad, the plaintiffs were (or the plaintiff No. 1 as the senior widow was) entitled to it, and all the plaintiffs were entitled to the self-acquisitions of their husband, that the plaintiffs were victims of fraud and conspiracy, and that certain documents *bantannama* and an *am-muktearnamah* upon which a consent decree was passed were obtained from them by the defendant by fraud and misrepresentation, the plaintiffs having had no independent advice in the matter, and the decree and the documents, therefore, are not binding upon them.

The plaintiffs, accordingly, prayed for recovery of possession of the impartible estate and the self-acquisitions of their husband, and for a declaration that the documents obtained from them were invalid, and for setting them aside, if necessary, that the properties left by the Raja might be ascertained after discovery, made by the defendant, and also for mesne profits and other reliefs.

The defence, inter alia, was that according to the custom of the Jheria Raj family females were excluded from succession, that Nanda Kishore and Brojo Lal never separated from Raja Udit and his branch, that Raja Durga Prasad being aware that the plaintiff's had no claim upon the estate, made moka-rari grants for life in favour of his wives, and executed a will by which he bequeathed a 10-annas share of the cash and jewellery to them, and made provision for their maintenance; that according to the rule of

lineal primogeniture which prevails in the family, the defendant representing the senior branch succeeded to the estate on the death of Raja Durga Prasad, that there was no conspiracy or fraud and the *bantannamas* and *Am-muktearnamah* were executed by the plaintiffs with full knowledge and having understood the terms thereof, that self-acquisitions were part of and go with the estate, and that the plaintiffs were not entitled to any thing.

The plaintiffs in May 1919 amended the plaint by including certain properties both moveable and immoveable, those of schedule *Ka* being alleged to have been obtained by Raja Durga Prasad from Jaimangal and those of schedule *Kha* being his self-acquisitions. The defendant put in an additional written statement with regard to the self-acquisitions.

The learned Subordinate Judge held that Nanda Kishore and Brojo Lal and their branches were joint with Raja Udit and his successors, and that the plaintiffs were, therefore, not entitled to the estate. He held, however, that the *bantannamas* and *am-muktearnama* were not binding upon the plaintiffs, that certain properties moveable and immoveable were the self-acquisitions of Raja Durga Prasad and, accordingly, gave a decree for the same to the plaintiffs and dismissed the rest of the claim.

The plaintiffs have preferred Appeal No. 194 of 1921 with respect to the estate, and properties other than those allowed by the Court below, and they claim that at any rate certain properties other than those allowed by the Court below should have been decreed as self-acquisitions. The defendant has appealed in No. 51 of 1922 with respect to the properties decreed to the plaintiffs and challenged the findings arrived at by the Court below against him.

It is admitted by both parties that they are governed by the Mitakshara School of Hindu Law and that the Jheria estate is an impartible one, the succession to which is governed by the rule of lineal primogeniture. A pedigree of the family herewith will show the names of the successive Rajas and the members of the family.

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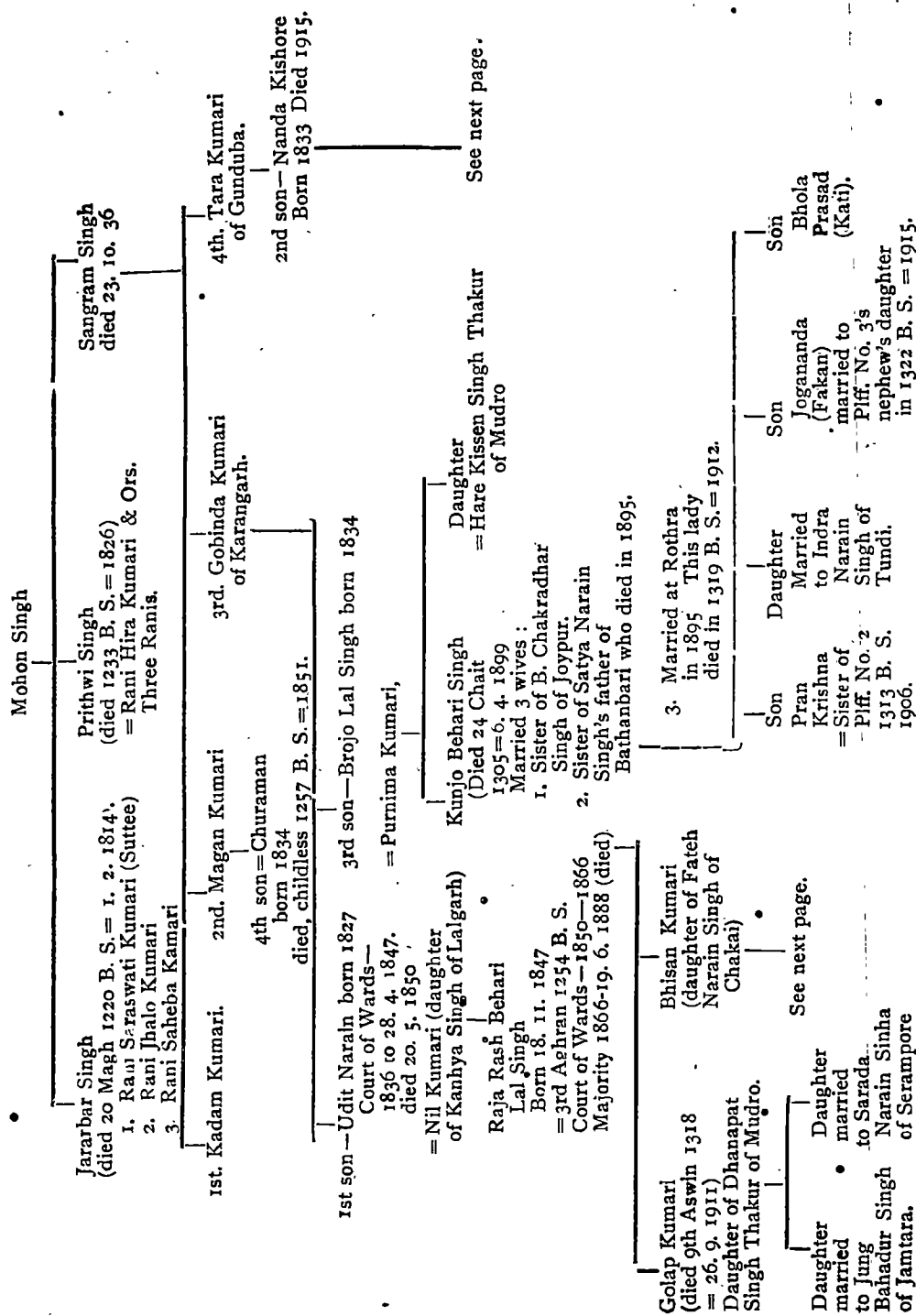
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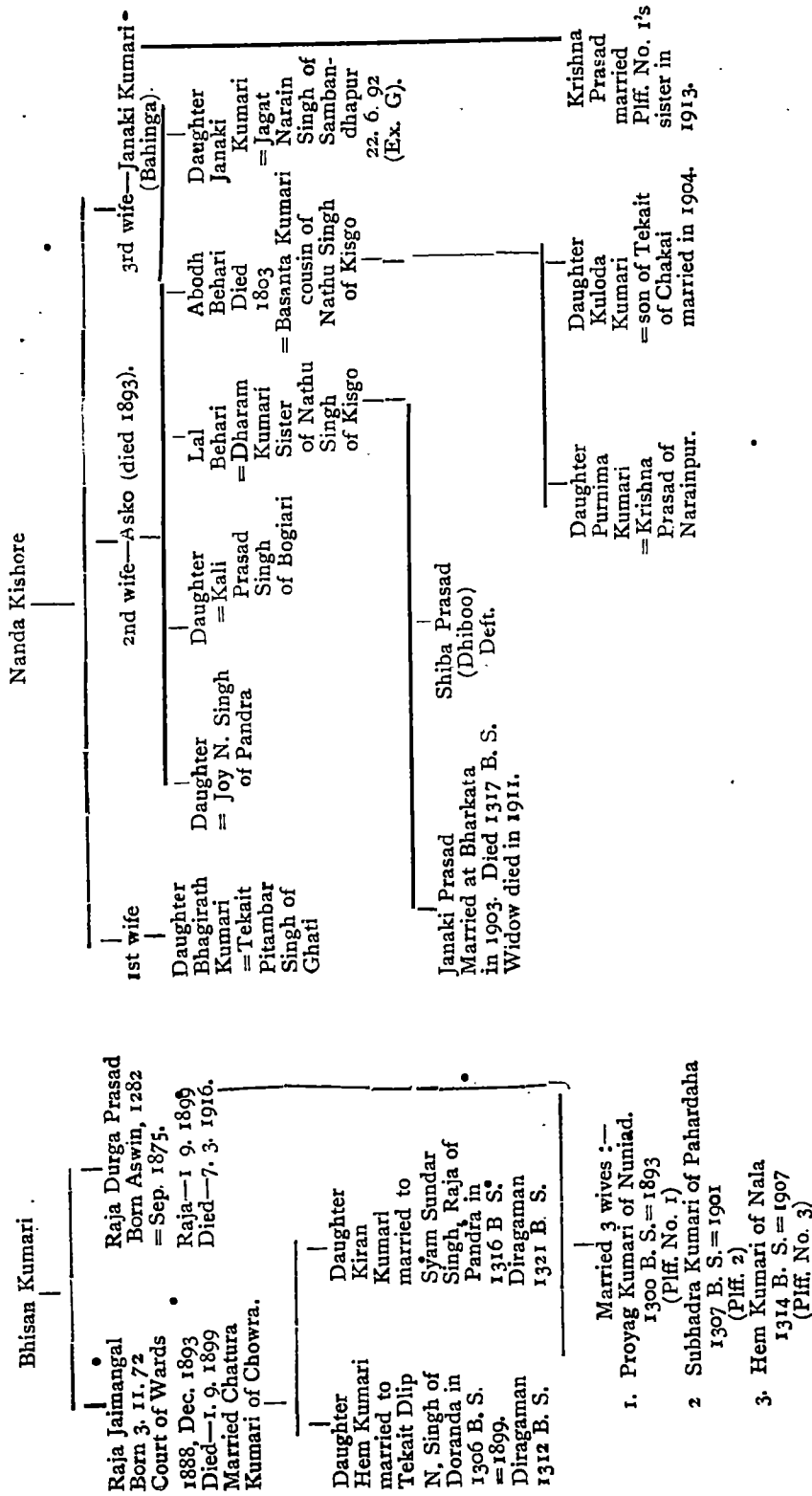
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As stated, the plaintiffs' case was that they were separate from Raja Udit and his successors. Before going into the facts of the case, we shall consider what constitutes separation in an impartible estate.

What constitutes separation.

So far as partible property is concerned, a definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation, but to have that effect the intention must be unequivocal and clearly expressed. See *Pandit Suraj Narain v. Pandit Ikbal Narain* (1). The intention to separate may be evinced either by explicit declaration or by conduct, and if it is an inference derivable from conduct it will be for the Court to determine whether it was unequivocal and explicit: See *Girja Bai v. Sadashiv* (2).

With regard to impartible property where it is not the self-acquired separate property of any member, but is the *ancestral* property of the family, what constitutes separation so far as the impartible estate is concerned? Is it separation in the general status of the family, or separation so far as the impartible estate itself is concerned? On behalf of the defendant, reference is made to the passage in the judgment in the *Shivagunga* case (3), (page 589) that the "question whether the family were undivided or divided becomes immaterial." But that is only where the property is *self-acquired* in which case, of course, the question of the general status is immaterial, because notwithstanding the undivided status of the family, self-acquired property will follow the course of succession to separate property. That, however, does not help us in determining what constitutes *separation* with respect to ancestral impartible property.

It is contended on behalf of the defendant that in the case of ancestral impartible property neither separation in mess and worship nor separation in estate with respect to partible properties constitutes separation so far as the impartible estate is concerned, so long as there is no renunciation on the part of the junior members of the right to maintenance and the contingent right of succession. Reliance is placed upon the case of *Chowdhry Chintamun Singh v. Mussumat Nowlukho Konwari* (4).

In that case a family possessed certain partible property (Purmeswarpur) and an impartible estate Gangore. For four generations different descendants of the common ancestor on each occasion of the death of the recorded proprietor laid claim to a

(1) (1912) L. R. 40 I. A. 40; 17 C. L. J. 288; I. L. R. 35 All. 80.

(2) (1916) 24 C. L. J. 207; I. L. R. 43 Calc. 1031; L. R. 43 I. A. 151.

(3) (1863) 9 M. I. A. 539; 2 W. R. P. C. 31.

(4) (1875) L. R. 2 I. A. 263.

share in talook Gangore as appertaining to the family property. There was a suit in 1832 by some members in respect of the family properties, and the dispute was settled by certain deeds. A partition of Parmeswarpur was effected and Gangore was admitted to be an impartible estate to be held by a single member according to the family custom of lineal primogeniture, the junior members agreeing that they should have no claim or right in respect of Gangore. In 1852 again, and subsequently also, there was litigation ending in compromise. Upon the death of Ranjit Singh the last holder in the senior line, leaving a widow, a suit was brought by Chintamun Singh the descendant in the second line for the recovery not only of Gangore but also of Parmeswarpur. The main question for decision was whether by reason of the acts of the parties on the several occasions of the partial partition in 1832 and of the compromise in 1852, the plaintiff's father waived his right of succession. The High Court held that he did, but it was decided in the negative by the Judicial Committee. Their Lordships observed "There is nothing in the transaction which evinces any intention on the part of the junior members of the family to part with or transfer any right or contingent right of property which they might have; they only admitted that they had no claim to share in talook Gangore as co-parceners". It was found by the trial Court that Chintamun's family was entirely separate in business and estate. (See 2 I. A. 263). It was also found that Chintamun did not live in commensality with Ranjit, and that the property specified in the plaint (excepting Gangore) did not appertain to a joint undivided estate [See *Natukhee v. Chintamun* (1) per Morris, J.].

Great reliance is placed upon this case on behalf of the defendant as showing that notwithstanding a complete separation in other respects, a family may continue joint with regard to the impartible estate unless the junior members give up their rights to it.

On the other hand, it is contended on behalf of the plaintiffs that the decision rested upon a custom of exclusion of females from succession because unless renunciation was proved, the widow had no right to succession even to the partible property Parmeswarpur notwithstanding separation in the family.

It is true that Chintamun Singh (the plaintiff) set up two customs, one of lineal primogeniture with respect to the impartible estate, and the other of female exclusion with regard to the partible as well as to the impartible property. The trial Court found that no custom of exclusion of females was proved, and that there was

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(1) (1873) 20 W. R. 247 (251).

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nothing to prevent the widow of Ranjit from taking his separate property, with the result that she got Parmeswarpur. It was only the widow who appealed with respect to Gangore. There was no cross-appeal by the plaintiff Chintamun. The finding of the trial Court that Ranjit was separate from Chintamun, and his widow was consequently entitled to succeed to his separate property, was therefore not challenged on appeal. The High Court, accordingly, had to deal only with succession to the impartible estate Gangore. Phear, J. said "The first question which arises is—was the plaintiff at the time of Ranjit's death joint with Ranjit in respect of this impartible property". The learned Judges held that Gangore became the separate property of Ranjit by reason of the deeds of compromise, and as the custom restrictive of the widow's right to succeed her husband had not been made out by the evidence, it followed that the plaintiff failed to make out his right to Gangore as well as to the partible property Parmeswarpur. Chintamun's suit was accordingly dismissed entirely. On appeal, their Lordships stated (2 I. A. at 270 last paragraph) "It is, however, found as a fact and cannot be denied that there has been to some extent a separation of this family, and the question therefore is, whether this particular property after the separation lost the character which it before possessed, and became subject to a different rule of succession." Having found that by the deeds of compromise the junior members did not give up their contingent rights to Gangore, their Lordships held that it did not become the separate property of Ranjit, and relying upon the *Shivagunga case* (1) observed that, whether the status of the family be joint or divided, property which is joint will follow one, and property which is separate will follow another course of succession".

The junior members of the family by an agreement may give up their rights to the impartible estate just as they may do with respect to partible property, and the High Court and the Judicial Committee considered whether they did give up their contingent rights (whatever they might be to Gangore). But the question does not appear to have been considered with reference to the custom of female exclusion as contended on behalf of the plaintiffs. The custom of female exclusion was not referred to in the judgment of the Judicial Committee at all, the custom referred to being the custom of impartibility and succession by a single member. The question considered by the Judicial Committee was whether the impartible estate Gangore had become the separate property of

(1) (1863) 9 M. I. A. 539 ; 2 W. R. P. C. 31.

Chintamun which again depended upon the question whether the junior members had given up by the deeds of compromise their contingent rights to the impartible estate, because if they had, it would become the separate property of Ranjit in which case, Chintamun could not succeed notwithstanding the custom of succession by lineal primogeniture to the impartible estate. The custom of female exclusion with respect to separate property was found against the plaintiff by the trial Court, and the High Court also found that no such custom was proved with respect to the impartible or partible property. Reference is made to a passage at page 264 where it is stated that the Subordinate Judge was of opinion that the plaintiff had in reference to the taluk Gangore proved the custom as alleged by him and accordingly gave him a decree. But the custom alleged and found by the Subordinate Judge was that of succession by lineal primogeniture and not exclusion of females.

The case, therefore, is an authority for the proposition that even though the general status of the family be divided, there may be jointness with respect to the impartible estate unless there is renunciation by the junior members.

If the property was not the separate property of Ranjit, but ancestral property of the family, the plaintiff would under the Mitakshara succeed in preference to the widow, provided the family was undivided. Evidently notwithstanding the fact of the family being, otherwise divided, it was not considered to be a divided family with regard to the impartible estate.

In *Stree Rajah Yanumula v. Stree Rajah Yanumula* (1) the question at issue was whether the family of which the parties were members was an undivided or a divided Hindu family. The general status of the family was found to be undivided, and the *Shivagunga case* (2) upon which reliance was placed (as showing that succession to an impartible estate follows the succession to a separate estate) was distinguished on the ground that in that case the estate was the self-acquired and separate property of Gowary Vallaba Taver, and that the decision "assumes that if this had not been so, the decision would have been the other way". Their Lordships held that the "mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate" and considered the question "Has it been shown that though the family was undivided, this estate was in fact the separate property of the plaintiff's husband" and upon the evidence came to the

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(1) (1870) 13 M. I. A. 333 ; 13 W. R. P. C. 21

(2) (1863) 9 M. I. A. 539 ; 2 W. R. P. C. 31.

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conclusion that the estate was "in its inception part of the common family property though impartible and therefore with certain modifications enjoyable by only one member of the family at the time", and that it was not a separate property..

In *Periasami v. Periasami* (1) an impartible zemindary, originally portion of the Shivagunga estate, having descended under the Mitakshara Law as joint ancestral estate to the eldest of three Hindu joint brothers was in 1829 by a deed of family arrangement transferred by him to the two younger brothers (one of whom died subsequently without issue), to be held by them with all its incidents of impartibility and peculiar course of descent and it was held that as between the descendants of the grantor and the son of the surviving grantee, the zemindary was the separate property of the latter, and that on his death, his right passed to the widow notwithstanding the undivided status of the family according to the rule of succession affirmed in the *Shivagunga case* (2).

It is to be observed that it was found that the family remained joint and undivided even after the agreement of 1829 and their Lordships held that on the death of Dhorai his rights passed to the widow notwithstanding the *undivided status* of the family.

The case was analogous to the *Shivagunga case* (2) and followed it. In both the cases, the general status of the family was found to be undivided. In the *Shivagunga case* (2), the impartible estate was found to be the *self acquired* property of Gowery Vallaba, hence the rule of succession to separate property was followed. In this case *Periasami v. Periasami* (1) the impartible estate by arrangement became the *separate* property of Muthusami, and stood on the same footing as self-acquired property, and the same rule of succession was followed. It was converse to the *Gangore case* (3) in which the general status of the family was divided, but the impartible estate was held to be joint. It is, accordingly, contended for the defendant that succession to an impartible estate does not depend upon the general status of the family but upon the question whether there was jointness in respect of the particular property viz., the impartible estate itself.

It is to be observed,* however, that in this case *Periasami v. Periasami* (1) there was no question of renunciation of any contingent right of succession by a junior member. Muttu who had present right to and was in enjoyment of the impartible estate Pudamattoor, transferred his rights to it in favour of his younger

(1) (1878) L. R. 5 I. A. 61; I. L. R. 1 Mad. 312.

(2) (1863.) 9 M. I. A. 539; 13 W. R. P. C. 31.

(3) (1875) L. R. 2 I. A. 263.

brothers as he was going to get a larger estate (the Shivagunga Estate). Pudamattoor being found to be the separate property of Muttusami would of course follow the course of succession to separate property as laid down in the *Shivanga case* (1).

In *Yarlagadda v. Yarlagadda* (2), the suit was for maintenance by a junior member of the family (the younger brother of the holder of the impartible estate). There was a previous suit for partition of the entire family property. It was decreed so far as the partible property was concerned and the rest was held to be impartible. The suit for maintenance was defended by the zemindar on the ground *inter alia* that since the decree in the previous suit decided that the zemindary was impartible, he was no longer liable to maintain the plaintiff. The Judicial Committee held agreeing with the High Court [See *Mallikarjuna v. Durga Prasada* (3)], that the "family of the parties to the present action has not become a divided one in consequence of the proceedings in the previous suit to which reference has already been made. It is true that in that suit a decree was made for partition of a portion of the family property, but it was a very inconsiderable portion, and had no relation whatever to the zemindary estate. As to the zemindary estate, this Board held that it was impartible and the consequence is that the plaintiff, the younger brothers of the zemindar, retain such right and interest in respect of maintenance as belong to the junior members of a raj or other impartible estate descendible to a single heir—See *Sartaj Kuari v. Deoraj Kuari* (4)." The suit related to *maintenance* and not to succession and probably for that reason the words "and possible rights of succession" [quoted from *Sartaj Kuari's case* (3)] in the judgment of the High Court were omitted from their Lordships' judgment. However that may be, the partition of the partible properties was held not to effect a severance of the family.

It is contended on behalf of the plaintiffs that the question whether the family was joint in food or worship was not raised nor gone into, that the only question considered was whether the partition of the partible property deprived the plaintiff of his right to maintenance. It is further contended that the right to maintenance does not depend upon jointness, as a separated member may get maintenance and that the question of the right to maintenance itself was not raised in the trial Court, but was raised for the first time on appeal. But the plaintiff alleged that the father died on

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(1) (1863) 9 M. L. A. 539.

(2) (1900) L. R. 27 I. A. 151; I. L. R. 24 Mad. 147.

(3) (1893—94) I. L. R. 17 Mad. 362 (365).

(4) (1887—88) L. R. 15 I. A. 51 (62); I. L. R. 10 All. 272.

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6th April 1875, that disputes arose and plaintiff lived apart from defendant from 1st May 1875 [See *Mallikarjuna v. Durga Prasada* (1)] and in the judgment of the High Court it was stated "In this case it is admitted that the plaintiff has since the 1st May 1875 been living apart from the defendant, and has neither asked nor received maintenance except what he received under the order of the High Court pending the appeal to the Privy Council, that is, between December 1887 and July 1890" (See page 367). Admittedly, therefore, the family was divided in other respects, and the defendant pleaded that since the decree in the partition suit deciding that the zemindary was impartible he and the plaintiff has been divided in estate and that he was no longer liable to maintain him. But the Judicial Committee, as stated above, held that the family *had not become a divided one* in consequence of the partition, and that the junior members' right to maintenance was unaffected, which could be only on the footing that the family was still joint with respect to the impartible estate from which it was claimed.

In *Sri Raja Viravara v. Sri Raja Viravara* (2) on the death of the zemindar his eldest son succeeded to the estate and his younger brother executed a document in the following terms:—"As we have both equally divided and taken all the cash, jewels and other (property) in the palace to which both of us are entitled, I bind myself not to claim (anything) from you at any time. I shall reside in the village of Addapusila, which you were pleased to give me for my maintenance, and act according to your wishes", and by a second document stated:—"I or my heirs shall not at any time make any claims against you or your heirs in respect of property movable or immovable, or in respect of (any) transaction. As our father put you in possession of the Belgaum zemindari, I or my heirs shall not make any claim against you or your heirs in respect of the said zemindari".

The zemindari was *not impartible* but their Lordships observed that "as between the plaintiff and the defendant, the question whether the zemindari is partible is of no importance. Even if impartible it may still be part of the common family property and descendible as such, in which case the widow's estate of the plaintiff would be excluded. The real question, therefore, is whether it has ceased to be part of the joint property of the family of the first zemindar or (in other words) whether there has been an effectual partition so as to alter the course of descent". Referring to the two documents mentioned above, their Lordships observed:—

(1) (1893-94) I. L. R. 17 Mad. 362.

(2) (1897) L. R. 24 I. A. 118; I. L. R. 20 Mad. 256.

" Their Lordships do not find any sufficient evidence in the arrangement made by these documents of an intention to take the estate out of the category of joint or common family property so as to make it descendible otherwise than according to the rules of law applicable to such property. The arrangement was quite consistent with the continuance of that legal character of the property. The elder brother was to enjoy the possession of the family estate, and the younger brother accepted the appropriated village for maintenance in satisfaction of such rights as he conceived he was entitled to. In the opinion of their Lordships, it was nothing more in substance than an arrangement for the mode of enjoyment of the family property which did not alter the course of descent." So that the partition of the moveables, the residence in a separate village, and an agreement not to claim anything from the zemindar on receiving a village for his maintenance were held not to constitute separation.

It appears, therefore, that in the *Gangore Case* (1); in *Yarlagadda v. Yarlagadda* (2) and *Sri Raja Viravara v. Sri Raja Viravara* (3) notwithstanding partition of other properties and notwithstanding separation in other respects, the impartible estate was held to be undivided.

In some cases, however, there are observations to the effect that the succession to ancestral impartible estate depends upon the person being member of an undivided Hindu family and the impartible property being common family property. In laying down the principles of succession in the *Sivagunga Case* (4), their Lordships observed that the succession of the nephews was dependant upon their being members of the undivided Hindu family, and the impartible property being part of the common family property. In *Rajah Rup Singh v. Rani Baisni* (5), their Lordships observed that, according to the Mitakshara Law the estate being ancestral and the family being undivided the plaintiff as the nearest male heir of the deceased was entitled to succeed in preference to the widow. Referring to the contention that the legal status of the family had been altered by reason of certain proceedings with reference to the maintenance annuity their Lordships observed that it did not in any manner alter the status of the plaintiff as a member of the joint family.

In *Raja Yanumula v. Raja Yanumula* (6) their Lordships referred to the fact that "general status of the family as an undi-

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(1) (1875) L. R. 2 I. A. 263.

(2) (1900) L. R. 27 I. A. 151.

(3) (1897) L. R. 24 I. A. 118. (4) (1863) 9 M. I. A. 539; 2 W. R. P. C. 31.

(5) (1884) L. R. 11 I. A. 149 (153); 1 L. R. 7 All 1.

(6) (1870) 13 M. I. A. 333 (336); 13 W. R. P. C. 21.

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vided family has been ascertained" by the Courts below, and proceeded to deal with the contention that an impartible estate must from its very nature be taken to be separate estate and governed by the rule of succession to a separate estate. In *Maḥarani Hiranath Koer's Case* (1), Couch C. J. observed "In this case the estate was ancestral and the family undivided."... "There is here an ancestral estate and an undivided family for there is no proof that the family of Tej singh had become divided" and again "where the property is ancestral and the family undivided."

In *Jogendra Bhupati v. Nityanund Mansingh* (2), the question related to the succession of an illegitimate son on the death of the legitimate son dying without leaving any male issue. It is not clear whether the family was undivided, but their Lordships quoted with approval the observations of Nanabhai Haridas J. in *Sadu v. Baiza* (3), which was a case of an undivided family property.

It is contended on behalf of the plaintiffs that "undivided family" means a family undivided with respect to the particular property i.e. the impartible property itself. It is not clear that "by undivided family" their Lordships in these cases meant "undivided" with reference only to the impartible property itself, and not to the general status of the family. In the case of *Raja Yanum ula* (4), the *general status of the family* was expressly referred to.

Then there are a number of cases which lay down that the rule of succession to partible property applies to impartible property also subject to such modifications as naturally flow from the character of the property. In the *Sivaganga* case (5), it was held that the rule of succession to an impartible estate was that of the general Hindu Law with "such modifications only as flow from the impartible character of the subject." In *Jogendra Bhupati's* case (2), their Lordships observed that the "rules which govern the succession to a partible estate are to be looked at, and therefore the question in this case is, what would be the right of succession, supposing instead of being an impartible estate it were a partible one." See also *Muttuvaduganadha v. Periasami* (6), and *Subramanya Pandya v. Siva Subramanya* (7), approved by the Judicial Committee in *Parbati Kunwar v. Chandarpal Kunwar* (8).

Now the rule of succession to partible property under the Mitakshara (*except as to self-acquired separate property*) depends

(1) 1872) 9 B. L. R. 274 ; 15 W. R. 375.

(2) (1890) L. R. 17 I. A. 128 ; I. L. R. 18 Calc. 151.

(3) (1878) I. L. R. 4 Bom. 37 (47-48). (4) (1870) 13 M. I. A. 333 (336).

(5) (1863) 9 M. I. A. 539.

(6) (1896) L. R. 23 I. A. 128 ; I. L. R. 19 Mad. 451.

(7) (1894) I. L. R. 17 Mad. 316 (325).

(8) (1909) L. R. 36 I. A. 125 (136) ; I. L. R. 31 All. 457 ; 10 C. L. J. 216 (225).

upon the general status of the family, and if the same rule of succession applies to impartible property it must be shown except in cases where the impartible estate is self-acquired property, that the family is an undivided one.

It is true that the observation in the above cases that the rule of succession to impartible property is the same as that which governs partible property merely refers to the mode of tracing the inheritance i.e. selecting the successor. But the successor is to be selected among the members of an *undivided* family in the case of partible property. The question therefore comes back to the point viz. whether the general status of the family, or only the impartible estate itself with reference to which the question of *undivided* family is to be considered. And unless the question is to be considered with reference to the general status of the family, it follows that ancestral impartible estate must be treated as undivided so long as there is no renunciation by the junior member because from the very nature of the property it cannot be the subject of common enjoyment.

In two recent cases viz, the *Telwa case* (*Thakurani Tara Kumari v. Chaturbhuj*) (1) and the *Serampore case* (*Rani Jagadamba Kumari v. Wazir Narain*) (2) however, the Judicial Committee considered the question of jointness in food, worship and estate as determining the question of succession. In the first case, the holder of an impartible estate of a joint Hindu family descending by primogeniture subject to the making of maintenance grants to younger sons, made a *Moharari* grant to his younger brother for maintenance. The grantee built a separate house, divided from his brothers by a wall, established therein a *Tulshi Pinda* and *Thakurbari* and lived there separately from his brother. He defrayed the marriage expenses of his daughter by borrowing money, subsequently to the grant. It was held upon the facts that there had been a complete separation between the two brothers, and that the impartible estate consequently became separate property in which the plaintiff, the widow of the last holder was entitled to a widow's estate. As considerable reliance has been placed upon this case by the plaintiffs, it will be dealt with more fully later. We only wish to point out here that no question of *renunciation* by the younger brother of any contingent right of succession was gone into in any of the Courts, and the principle contended for by the defendant that notwithstanding separation in food, residence or worship, the impartible estate remains joint until

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(1) (1915) L. R. 42 I. A. 192; I. L. R. 42 Calc. 1179; 22 C. L. J. 498.

(2) (1922) L. R. 50 I. A. 1; 37 C. L. J. 287.

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there is renunciation by the younger members of their contingent right to succession was not referred to in the case.

In the *Serampore Case* (1) also, no question of renunciation of any contingent right of succession was referred to. Their Lordships referring to the case of *Girja Bai v. Sadashiv* (2) and the *Telwa Case* (3) observed that they are "clear decisions that it is competent to a member of a joint family to separate himself from the family by a clear and unequivocal intimation of his intention to sever; but as in that case the person separating forfeits his chance of inheriting the whole of the estate by survivorship, it requires strong evidence to establish such separation. The latter case illustrates this. It was there found that the separation relied on was a complete separation in worship, in food, and in estate; and, further, there was good reason for the complete separation, and that consequently the requisite evidence was forthcoming. In this case these conditions are lacking, and their Lordships are unable to think that there has been any misapplication of the principles of law which regulate this question, and the findings of fact are sufficient to defeat the plaintiff's claim".

In both these cases, therefore, the question of succession was considered with reference to the question of the general status of the family, viz., whether there was separation in mess, worship or estate. There was no partible property to be considered in either of the cases, but the principle enunciated in some of the earlier cases viz. that the family remained undivided with respect to the impartible estate notwithstanding separate residence and mess and notwithstanding partition of the partible property was not referred to.

In the present case, there was no renunciation (at any rate any express renunciation) by Nanda Kishore of his contingent right to succession, and if the case is to be decided upon the principle of renunciation, it would not be necessary to go into the question of the general status of the family. But having regard to the fact that the decisions are not uniform, and having regard to the two recent cases viz. *Telwa case* (3) and the *Serampore case* (1) we think we should consider the evidence as to the general status of the family.

It is to be observed that the expressions such as "common family property", "common family stock", "family property", "joint family

(1) (1922) L. R. 50 I. A. 1; 37 C. L. J. 287.

(2) (1916) L. R. 43 I. A. 151; I. L. R. 43 Calc. 1031, 24 C. L. J. 207.

(3) (1915) L. R. 42 I. A. 192, I. L. R. 42 Calc. 1179, 22 C. L. J. 498.

property", "family property of a joint undivided family" occur in the *Shivagunga* case (1) and subsequent cases. Now in what sense an impartible estate is the "common family property"? From the very nature of an impartible estate it cannot be the subject of joint ownership. Joint enjoyment with a right to partition cannot exist in such an estate. Apart from the right of the junior members to maintenance which will be dealt with later, the junior members can have no present interest in the estate, they can only have a contingent right of succession.

In the case of *Periasami v. Periasami* (2) their Lordships referring to the fact that Muttu who succeeded to the Pudamattoor estate on the death of his father Oya Taver as his eldest son, had brothers, observed that the "estate must be taken to have descended to Muttu as an ancestral estate. He would, therefore, necessarily be joint in that estate, so far as was consistent with its impartible character, with his two younger brothers, the latter taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindu family in the case of a Raj or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate though impartible was up to the year 1829, in a sense the joint property of the joint family of the three brothers."

In *Naraganti v. Venkatachalapati* (3) it was held by Sir Charles Turner C. J. and Muttusami Ayyar, J. that an impartible paleiyam governed by the rule of primogeniture, though possessed exclusively by one member of the family, is the joint property of the family, and in the event of a death passes by survivorship.

The learned Judges referred to the interests of the junior members of the family as "coparcenary interest in the estate represented by their enjoyment of maintenance and possibility of succession" and observed, "Where property is held in coparcenary by a joint Hindu family, there are ordinarily three rights vested in coparceners—the right of joint enjoyment, the right to call for partition, and the right to survivorship. Where impartible property is the subject of such ownership, the right of joint enjoyment and the right of partition as the right of an undivided coparcener are, from the nature of the property, incapable of existence. But there being nothing in the nature of the property inconsistent with the rights of survivorship, it may be presumed that right remains. The right to call for partition altogether disappears—the right of joint enjoy-

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(1) (1863) 9 M. 1 A 539.

(2) (1878) L. R. 5 I. A. 61.

(3) (1880) I. L. R. 4 Mad. 250.

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ment is superseded by a right of successive enjoyment ... But where from the nature of the property possession is left with one coparcener, the others are not divested of co-ownership. Their necessary exclusion from possession imposes on the co-owner in possession two obligations to his co-parceners in virtue of their co-ownership the obligation to provide them with maintenance and the obligation to preserve the *corpus* of the estate".

This case was approved by the Judicial Committee in several cases relating to succession, but the obligation to *preserve the corpus of the estate* (and the consequent restraint on alienation) is done away with by the decisions of the Judicial Committee in *Sartaj Kuair's case*, (1) and the first *Pittapur case* (2). It is contended on behalf of the plaintiffs that the right of survivorship is affected by the said decisions and that the right to maintenance is also gone by reason of the decision in the second *Pittapur case* (3).

It is contended by the defendant that so long as a member gets maintenance he is joint if he does not give up the right of survivorship; that even if he does not get maintenance, but has not given up the right to it nor to survivorship, he must be held to be joint in the limited sense; and that mere separation in mess and worship is not enough though coupled with non-receipt of maintenance, unless explained, would be very good indication, but not conclusive, of separation in estate because a junior member may not need maintenance.

The questions of maintenance and succession will be dealt with later, but having regard to the state of the authorities, we think we should consider the evidence whether there was separation in food, worship and estate.

Custom of exclusion of females.

Before dealing with the question of jointness, we shall consider a defence raised by the defendant in paragraph 1 of his written statement that "according to the long standing family custom and usage of the Raj family of Jheria, no female has ever been or can be the heiress to the Raj estate of Jheria". In the 4th and 8th paragraph four instances were set out. These four instances are said to have occurred on the death of Rajah Indra Singh, Raja Jharwar Singh, Raja Pirthi Singh and Raja Jaimangal Singh respectively, and in each of these cases the brother or cousin

(1) (1887-88) L. R. 15 I. A. 51.

(2) (1898) L. R. 26 I. A. 83; I. L. R. 22 Mad. 383.

(3) (1918) L. R. 45 I. A. 148; 28 C. L. J. 428.

(as the case may be) succeeded to the exclusion of the widow.

Now, on the death of Raja Indra Singh, his cousin Jaswant killed his illegitimate son and got possession of the estate. Jaswant was succeeded by his son Mohan Singh. The latter had three sons Raja Jharwar, Raja Pirthi and Raja Sangram. These three brothers were joint in food, worship and estate, so also were Raja Jaimangal and his brother Durga Prasad the sons of Raja Rash Behari and the succession in each of these cases took place by survivorship according to the Mitakshara Law under which the widow would necessarily be excluded. There was no case of a Raja being a separated member in which alone the question of exclusion of the widow under a custom could arise. It appears from the judgment of the Court below that the defendant's counsel at the time of the opening stated a new point viz. that the custom of female exclusion was introduced from the North-west (Rewa) whence the ancestors of the Rajas of Jheria are said to have come. There was no indication in the written statement of such a custom having been imported from Rewa by the ancestors of the Jheria Rajas and we think that the defendant should not have been allowed to raise such a custom when the plaintiffs had no opportunity of meeting it. The defendant relied upon the statements of certain persons in suits relating to other Raj estates and passages in judgments in those suits and certain other matters in support of the said custom. The learned Subordinate Judge has fully dealt with them. We will only discuss the contentions raised in this Court with regard to his findings. It is contended (a) relying on the case of *Abdul Hussein Khan v. Bibi Sona Dero* (1) that it ought not to be assumed that a custom fails because certain of the instances brought forward in its support may be referable to other causes than the custom relied upon. But the only custom set up in the pleadings was that of the Jheria Raj, and it is not in "certain instances" but in every one of the instances of the alleged female exclusion, that the succession took place according to the Mitakshara Law.

(b) That the custom of female exclusion having been pleaded though the origin of it was not set up, the defendant was entitled to rely upon the custom of Rewa, and reference is made to the *Lachmipore Raj case* (2). But the custom set up was that of the

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(1) (1917) L. R. 45 I. A. 10 (18) ; 27 C. L. J. 240.

(2) (1922) L. R. 50 I. A. 58 (65).

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Jheria Raj, and the plaintiffs had no opportunity of meeting a custom of Rewa.

(c) That the Court below should not have relied upon a number of instances in estates allied to the Jheria Raj estate but distinct from it in which females have succeeded and that such instances cannot prove abrogation of the custom in the Jheria family. But this contention assumes that there was a custom of the Jheria Raj family of which there is no evidence. Besides, the defendant also relied upon some instances in allied families.

(d) That the Court below has wholly misunderstood the decision in *Rao Kishore v. Musammatt Gahenabai* (1). But the passage from that case relied upon by the defendant viz. "such a custom (lineal primogeniture) may, if observed and acted upon, survive the primitive condition of things out of which it originally from the very necessity of the case sprung..." has no application to the present case. There is nothing to show that the ancestors of the Jheria Rajas had any such custom at Rewa which they brought with them. The Court below points out that "there is no evidence worth the name that their remote ancestors ever exercised sovereign powers in Rajputana or any where else nor is there anything to show that they came with sovereign powers to Palgunge and subsequently from Palgunge to Jheria. On the other hand, there is evidence to show that they were subordinate to the Raja of Panchkote.

(e) That no evidence is necessary beyond the fact that the family is a Baghela Rajput family. It is not shown, however, that all the Rajputs of Rewa to whatever clan they might belong, had a custom of female exclusion, assuming that the ancestors of Jheria Raja were Baghela Rajputs of Rewa.

The learned Subordinate Judge has pointed out that in some cognate families, such as Nawagarh, females do succeed. He has fully dealt with the evidence, and we entirely agree with him in his reasons and his finding that females are not excluded by any family custom or usage from succession to the Jheria Raj.

It is said in the written statement that according to the custom of the Raj family, if a Raja dies leaving more than one son, the eldest son gets the title of "Tikait," the second son gets the title of "Kumar," the third son gets the title of "Thakur" and the fourth son gets the title of "Noonoo" and if the Tikait after becoming Raja has no son, the future heir gets the title of "Kumar". It is said that the Jheria family has kept up these titles which shows that they have kept up the custom of Rewa. But there is nothing to

show that, assuming their ancestors came from Rewa, they came from a family in which such titles were used. We do not think that the use of such titles or the performance of "*Tika Pagree*" or the fact that the residence is called a *garh* or that succession is governed by lineal primogeniture is of any help to the defendant in proving the new case of custom set up by him. The question of titles, however, has a bearing upon another part of the case which will be dealt with later.

Evidence.

The evidence adduced by the parties in this case is voluminous. The paper-books consist of 47 volumes. The trial in the Court of the Subordinate Judge lasted about five months, and the hearing of these appeals has occupied about three months.

The documentary evidence consists partly of ancient records, the decision of Courts in other cases and the correspondence and proceedings of the Court of Wards, under whose management the estate has from time to time passed. But the great volume of documentary evidence consists of the accounts of the estate. These for many years have been kept in great detail. The entries in them throw a good deal of light upon the doings of the family; and considerable reliance has been put upon them by both parties. The system in use was that every payment, however small, from the Raj treasury was vouched for on a small slip of paper which was known as a *Chutka*. Every such payment was then entered in the *rokar* or day book and thereafter in the *khatian* (ledger) and other accounts. An enormous number of these *chutkas* and entries in the *rokars* have been exhibited.

The oral evidence consists of the depositions of witnesses examined on commission and those examined in Court. The examination of witnesses examined on commission was inordinately long. The plaintiff No. 1 was examined and cross-examined at 110 sittings and her evidence has taken up one volume of the paper-books. The deposition of some other witnesses was also very long.

The Court below observed "At the outset I consider it necessary to state that the oral evidence on either side is not of much worth and cannot be relied upon unless corroborated by something more reliable. All the witnesses save and except Colonel Brown of Calcutta appear to me to be untruthful or biassed. In deciding the case, I shall rely mainly upon documentary evidence. I shall not rely upon oral evidence unless it is corroborated by documentary evidence or unless under the circumstances disclosed in the particu-

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lar matter under investigation it seems to me to be natural and probable". Learned counsels on both sides have also mainly relied upon the documentary evidence before us.

Account Books.

The defendant adduced evidence to show that most of the papers of Raja Rash Behari's time were eaten up by white ants or otherwise destroyed and that there were no other accounts of that period except the loose sheets of papers Exhibits F1 to F9 which were rejected by the Court below. Plaintiff's witness Jaga Bandhu Roy (formerly manager) said he could not find some papers, but the defendant relies upon his letter, dated so far back as the 24th January 1903 [Exhibit M (17)] to the Raj Mukhtear at Purulia in connection with a case that "most of the *rokars* and old papers of the Raj estate have been destroyed, and if any be found I shall try to file it on the date fixed." It appears, therefore, that most of the papers of that period are not in existence.

As for Jaimangal's time the accounts are in existence, but it is said that the details were not always stated in the *rokars*, the Raja himself used to spend a good deal and the *rokars* do not show what he did with the money so spent.

During Raja Durga Prasad's time (1899 to 1916) all the accounts *chutkas*, *kutchas* and *pucca rokars* and *khatians* were in order and have been well preserved. But the *chutkas* of some earlier years have not been produced nor the *pucca rokars* and *khatians*. The plaintiffs say that they have been suppressed because they would show that some entries were under the heading of *magan*. It appears that *kutchas* *rokars* were written from the *chutkas*, and the *pucca rokar* from the *kutchas* *rokars*. It is contended for the defendant that the *pucca rokars* would not contain anything not contained in the *kutchas* as it was the latter from which the former was written. No doubt the *kutchas* *rokar* is the original—the balance is struck in it every day and the manager sometimes signed it and sometimes the *pucca rokar*. But it appears from the evidence of the defendant's witnesses that the cashier and mohurir used to decide what items of expenses should be entered under which heading, and that the headings of entries were written in red ink in the *pucca rokars*. Our attention was drawn to some discrepancies between the headings in *chutkas* and *kutchas* *rokars*. The non-production of the *pucca rokars* is, therefore, open to comment. It appears, however, that on the 23rd May 1919 the defendant produced in Court *pucca rokars* from 1300 to 1308, *kutchas* *rokars* from 1309 to

1325, and *chutkas* and counterfoils of some years (not all). On the 28th June 1919 the defendant in his affidavit of documents disclosed that he had *pucca rokars* from 1309 to 1325 in his possession, and also that he had 40 bags containing 50 to 60 thousand *chutkas*. On the 18th July defendant offered to give inspection to plaintiffs of all account books and *chutkas*. On the 30th July plaintiffs applied for inspection of the account books at Alipore, the defendant offered to give inspection at Jheria and to produce in Court any particular *rokar* wanted by the plaintiffs. The Court did not order production of *pucca rokars* generally. On the 18th November the plaintiffs applied for inspection of *pucca rokars* of 1323 to 1325 and they were produced. The plaintiffs again applied for production of all *jabedās* and *khatians* for 1326, the Court ordered their production and they were, accordingly, produced. It is said for the plaintiffs that they could not ask for the production of the *pucca rokars* without inspection. It seems unreasonable for the defendant to require the plaintiff's pleader to go to Jheria to inspect the *pucca rokar* books (only one or two dozen books), but although their non-production is open to comment, it seems that the plaintiffs did not press for their production.

In order to understand the references to the account books and elsewhere, it may be pointed out (as already stated) that in the Jheria family the eldest son of the Raja was called the Tikait, the second Kumar, the third Thakur, and the fourth Babu or Noonoo. Accordingly, after Raja Sangram's death, Nanda Kishore was the Kumar, Brojo Lal was the Thakur and Churaman was the Babu or Noonoo. During Raja Jaimangal's time his brother Durga Prasad was called the Kumar, and since that time, Nanda Kishore was known as *Bura* (old) Kumar. Among the descendants of Nanda Kishore and Brojo Lal, these titles were generally observed but not always, for instance, Siva Prosad the defendant was called *Dhibu Noonoo* even after Janaki Prasad's death.

Onus of proof.

It is contended for the plaintiffs that as Nanda Kishore has separate residence and was in separate mess for more than 80 years before suit, the onus of proving that he was joint was upon the defendant and certain decisions were cited in support of the contention. We will refer to only some of them. In *Bannoo v. Kashee Ram* (1), their Lordships observed that in the case of an ordinary Hindu family who are living together or who have their entire

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property in common, the presumption is that everything in the possession of any one member of the family belongs to the common stock. The onus of establishing the contrary rests on him who alleges separate property. But this presumption does not arise where it appears that there has been a division of the family property, and a separation in the family all the members of which are living separately. That case, however, related to partible property, and there was some sort of *division of the ancestral estate*, and all the members were living separately; the person who was alleged to be joint with the plaintiff, was in possession of the property ostensibly as his own at the time of his death, and the plaintiff set up jointness (converse to the present case). In the case of *Obhoy Churn Ghose v. Gobind Chunder Dey* (1), where the defendant was in exclusive possession of a property for over 12 years and the plaintiff sought to recover his share on the ground that the ancestors were joint at one time, Garth C. J. and Mitter, J. observed that a distant member of the family by proving that at some period, even 100 years before, their common ancestors were members of a joint family, could not throw the onus of proving that the property was not joint upon the defendants. On the other hand, in the case of *Prit Keer v. Mahadeo Prosad* (2), where the plaintiff sought to recover property upon the ground that the property in dispute belonged to her father separately, their Lordships held that as the plaintiff's father and his brother were at one time joint in estate the onus was upon the plaintiff to prove separation.

Reference was made to the case of *Jagun Koor v. Rughoonundun Lall Shahoo* (3), where it was held that separation in food and residence raised a presumption of separation in estate. On the other hand, in *Rewun Persad v. Mussumat Radha* (4), it was held that a separation from commensality does not as a necessary consequence effect a division, or at least of the whole undivided property.

In *Mussumat Anundee Koonwur v. Khadoo Lal* (5), it was observed that "the cesser of commensality is only material in so far as it removes or qualifies the presumptions which the Hindu Law might otherwise raise that an acquisition made in the name of an individual son of the family was made by the head of the family and as part of the family estate."

(1) (1882) I. L. R. 9 Calc. 237.

(2) (1894) L. R. 21 I. A. 134; I. L. R. 22 Calc. 85.

(3) (1868) 10 W. R. 148.

(4) (1846) 4 M. I. A. 137 (168); 7 W. R. P. C. 35.

(5) (1872) 14 M. I. A. 412 (422).

In the case of *Ram Pershad Singh v. Lakhpati Koor* (1), the High Court observed "It must be remembered that joint family worship is the pivot around which the life of a Hindu family turns. ...If the conclusion on these two points viz. separation in mess and worship, on which we are in accord with the Subordinate Judge, be correct, it seems to us his view on the main question can scarcely be considered to be well-founded." On the other hand, in *Pandit Suraj Narain v. Pandit Ikbal* (2), their Lordships held that a separation in mess and worship may be due to various causes and yet the family may continue to be joint in estate. It is to be observed that the decision of the Judicial Committee in *Ram Pershad's case* (1), did not proceed upon any presumption but upon evidence.

The cases cited relate to *partible* properties. But even in the case of *partible* properties, as pointed by the Judicial Committee in *Pandit Suraj Narain's case* (2), separation in mess and worship may be due to various causes and yet the family may continue to be joint. In the case of *impartible* estates, the junior members cannot insist upon joint residence and mess, and the fact, therefore, that such a member is residing or messing separately does not necessarily raise a presumption of separation though taken along with other facts it may do so. The question of onus of proof would depend upon how far the facts are admitted by each side. In the present case, the plaintiffs alleged in the receiver application that Nanda Kishore separated in 1847. They are plaintiffs in ejectment, and in order to show their title they have to show that there was a complete separation by which the estate became the separate property of their husband. But the fact that Nanda Kishore and his branch were living separately for such a long time would have a bearing upon the question and the plaintiffs start with that fact in their favour, but that must be taken along with other facts proved or admitted. There is evidence on both sides to be considered and we, accordingly, proceed to consider the evidence.

On behalf of the defendant, it is contended that the plaintiffs have constantly changed their case as regards separation. It is urged that paragraph 4 of the plaint alleged a separation during the life-time of Sangram when the *Khorposh* grant was made. But all that it says is that among the sons of Raja Sangram, Udit was quite separate from his two brothers Nanda Kishore and Brojo Lal, not

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(1) (1902) I. L. R. 30 Calc. 231 ; L. R. 30 I. A. 1.

(2) (1912) L. R. 40 I. A. 40 (46) ; I. L. R. 35 All. 80 ; 17 C. L. J. 288.

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that the separation took place in Raja Sangram's life-time. Raja Durga Prosad in his plaint in the suit against Nanda Kishore and Kunja Behari (for resumption of *Khorposh* mouzabs) apparently was under the impression that the *Khorposh* grant was made by Sangram to Brojo Lal. But the *Khorposh* was granted in 1847 more than 70 years ago, and if Raja Durga Prosad was under a mistaken impression on the point, it is not to be wondered that the plaintiffs who could not have any personal knowledge (the eldest Rani being aged 38 was not even born then) were under the same impression. The defendant in paragraph 11 of his written statement filed on the 23rd May 1919 pointed out that the *Khorposh* grants were made by Raja Udit. In the application for appointment of a receiver dated the 11th September 1919 the plaintiffs stated that from the traditions of the family and from such records as have been collected and examined by their legal advisers it appeared that Nanda Kishore obtained a *Khorposh* grant from Udit and became "absolutely severed and separate" from the Raja in food, worship and estate.

Then it is contended that the plaintiffs' case was that the separation of Nanda Kishore took place in 1847 and that of Brojo Lal in 1857, but that after the defendants' counsel had finished his arguments in the Court below, the plaintiffs' counsel for the first time suggested that it took place between 1847 and 1893, and the defendant, therefore, had no opportunity of meeting such a case, and that the same case is made in the 7th ground of appeal to this Court.

The plaintiffs, however, by their petition dated the 29th September, 1921 asserted that their counsel had been throughout consistent as to the statement of the plaintiffs' case on the point of separation.

It is to be observed that the defendant in paragraph 7 of his written statement submitted that plaintiffs have always been aware that Nanda Kishore and his descendants had or have never been separate in estate, food or worship from Raja Udit and his descendants.

There was no written document of the alleged separation in this case, and it is difficult therefore to fix the exact time. A disruption is alleged to have taken place with Nanda Kishore in 1847, it went on for a long time—and it is certainly open to the plaintiffs to refer to the documents, statements and conduct subsequent to 1847 to support the case of separation in 1847.

The third issue was "were Brojo Lal and Nanda Kishore joint with Udit and were they dependent members of the Jheria Raj

family during the life-time of the said Udit Narain and the successive Rajas as alleged in the written statement." The issue was very wide, and the trial Court also decided the question whether Nanda Kishore was separate from Udit and his successors. In any case the documents upon which the plaintiffs relied to prove separation were filed, and the plaintiffs' witnesses were examined before the defendant was called upon to meet any case. So the defendant knew what he had to prove before he began to adduce evidence, and we do not think that the defendant has been prejudiced in any way.

Residence, Mess and Maintenance.

We now proceed to consider the evidence.

The original residence of the Jheria Rajas was at a place which is referred to as Puranagarh and is about a quarter of a mile from the present Rajbati. This Rajbati appears to have been built by Raja Sangram who lived there with his Ranis and children. Raja Pirthi Singh's widow and some other ladies of the family used to live at Puranagarh.

Raja Sangram died on the 23rd October 1836 leaving four widows and four sons :—

Rani Kadam Kumari (childless),

Rani Magan Kumari son : Churaman (Nunumani) aged 2 years.

Rani Gobinda Kumari-2 sons : Udit Narain aged 9 years and Brojo Lal (Thakurmani) aged 2 years.

Rani Tara Kumari-son : Nanda Kishore (Koonwar) aged 2½ years.

It appears that Raja Sangram had by a *wasiatnama* appointed Rani Kadam Kumari and Rani Gobinda Kumari trustees and managers of the estate and the management of the estate accordingly was left by the authorities in the hands of Rani Kadam Kumari and Rani Gobinda Kumari. On the 29th July 1837 they submitted a petition (Exhibit 29) to the authorities stating that they had been managing the estate and maintaining the minor Raja, the Kuars, and their co-wives, as also the other members of the family pursuant to the directions of their husband, that as desired by their husband they were living in harmony in the same *garh* in the same place and in the same mess, that the servants of the estate whom Raja Sangram had dismissed (and whose jaigirs had been resumed by him) pressed the Ranis for their reinstatement and, being unsuccessful, gave evil advice to Rani Magan Kamari and Rani Tara Kumari that they should get the estate partitioned, and took the

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said Ranis to Puranagarh on the pretext of their going to see the Rani of the late Raja Pirthi Singh and were putting forward many false and fraudulent statements. They further complained that they several times went to bring back the Ranis, but that they did not come owing to the advice of these wicked men and they prayed that these men might be kept under check, so that no slur might attach to the family, and that the said Ranis "might come and live in commensality with us as before in the same *garh* as directed by our late husband or that they may live on getting maintenance allowance in cash or that they do abide by the order that may be passed by your Honour". [The word "Separately" (live separately) which appears in the printed paper-book is not in the original]. The defendant contends that what Rani Kadam Kumari and Rani Gobinda Kumari wanted was that Ranis Tara Kumari and Magan Kumari should come back to the *garh* and either live in the same mess or take a cash allowance i. e. in either case living in the same *garh*. On the other hand, it is contended by the plaintiffs that it is not stated that they should *live in the same ghar* and the direction of the husband referred to in the earlier portion of the petition being that they should reside in the same *garh*, same mess and in unity, the Ranis' coming back to live in the *garh* on taking an allowance would not be a compliance with such directions, as there would not be the same messing and unison.

The passage is capable of either construction, but it is not of much importance, because even if the defendant's construction is the correct one, and even if the petition was not communicated by the authorities to Ranis Tara Kumari and Magan Kumari as contended by him, it did not affect the position. The Ranis were taken by dismissed and wicked Amlas to Pirthi Singh's widow's quarters at *Puranagarh*, the petitioners went several times to bring them back, they would not listen to their advice, and accepted and acted upon the evil advice of the Amlas and the fact remains that they did not come back in spite of the repeated requests of the petitioners.

It is said on behalf of the defendant that the Ranis of Raja Sangram had different mahals and that even during his life time, Tara Kumari and Magan Kumari with their children used to live at *Puranagarh*, while Rani Gobinda Kumari and her children and Rani Kadam Kumari lived with him at the new Rajbati, and that Ranis Tara Kumari and Magan Kumari came to the Rajbati during the Raja's last illness and went back to *Puranagarh* after his death.

There is, however, no evidence of this. It is true Nanda Kishore in his evidence in a suit in November 1897 stated "since the lifetime of my father his three Ranis lived in separate mahals and messed separately. The children of each Rani lived in her mahal and messed with her. After the death of my father the Ranis with their children continued to live in their respective mahals as before, when after the death of my father the estate was taken charge of by the Court of Wards". But Nanda Kishore was two and a half years old at his father's death, the statement therefore is only hearsay. On the other hand, the petition (referred to above) exhibit 29 shows that they were all living at the Rajbati in the same mess, at any rate for sometime after the death of the Raja. However that may be, since they left the Rajbati in 1837 Rani Tara Kumari with her son Nanda Kishore and Rani Magan Kumari with her son Churaman lived at *Puranaghar*. Rani Gooinda Kumari died leaving Rani Kadam Kumari the sole guardian of the minor Raja Udit and the estate was taken charge of by the Court of Wards in November 1837.

On the 25th June 1842 Tara Kumari by a petition Exhibit 3 complained of serious inconvenience for want of *ghar* &c. in the "*garh* Haveli" and stated that Rani Kadam Kumari and certain other persons "were all after killing" her and her son Nanda Kishore, and prayed that orders might be passed for payment of Rs. 375 for constructing new *ghars* for the residence of herself and her son. This was objected to by Rani Kadam Kumari who stated (see petition Ex. J2) "there is the custom prevailing in our family as well as among other zemindars that Raja has a *garh* where the Raja's family and cousins and other relations live and that no one except the Raja can have one. If any brother or Rani becomes separate he or she builds a house in a different place at his or her own expense, the Raja has not to bear any expense in that connection. Now without making any enquiry about the custom or practice in vogue the Saheb has at once passed an order for building a new *garh* out of the amount in deposit, this would cause heavy loss to the minor; and all the other members of the family such as Rani Hira Kumari and others would have to be paid in the same way." The petition of Tara Kumari did not refer to the erection of a new *garh* as erroneously supposed by Rani Kadam Kumari but the construction of new *ghars* (houses). However that may be, the plaintiffs relied upon these statements as containing an assertion on the part of Rani Kadam Kumari that Tara Kumari was *separate*. It is contended for them that what Kadam

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Kumari meant to say was that as Tara Kumari had become separate and wanted to build a new *garh*, she must do so at her own expense and was not entitled to any thing from the Raj. On the other hand, it is contended on behalf of the defendant that it shows just the opposite viz. that it is only a separated member who can have a new *ghar* which must be built by her at her own expense, and Tara Kumari not being a separated member was not entitled to costs of a new *garh* and if she were allowed, other members of the family such as Rani Hira Kumari and others would have to be paid in the same way.

Here, again, the construction is a doubtful one. If Kadam Kumari meant to say that Tara Kumari was entirely separate and therefore not entitled to the costs, there would be no necessity for referring to the fact that Rani Hira Kumari and other members of the family would have to be paid in the same way. It would have been sufficient to say that as a separated member she was not entitled to any costs. On the other hand, it may be said that as Tara Kumari was residing separately from the Raja's *garh* and as she was going to build a new *garh* (as erroneously supposed by Kadam Kumari) she was not entitled to the costs thereof, and that she must build such *garh* at her own expense. But Rani Hira Kumari was also living away from the Rajbati at the *Puranaghar* and she is referred to as a member of the family. Then again it appears from Exhibit J₂ that an earlier application was made by Tara Kumari for repairs of the *ghars* and Kadam Kumari's objection thereto seems to have been made only upon the ground that no repairs were necessary.

A sum of Rs. 150 was sanctioned for repairs of the *garhs* upon the petition (Exhibit 3). As stated above, the petition of Tara Kumari did not refer to the construction of a new *garh* but the construction of new *ghars* (houses). It is true that she wanted the costs of building all sorts of houses, *baikhana atchala* etc, not repairs to the old houses and that probably led Rani Kadam Kumari to think that she wanted to build a new *ghar*. But if the old houses had fallen down or had become unfit for habitation, she would be entitled to have new houses constructed because the Raj was bound to provide a residence for her and her son.

Tara Kumari wanted to build *ghars* presumably in *puranagarh*. If so, it was not a different place i.e. not unconnected with the Raj, as *puranagarh* belonged to the Raj and was formerly the residence of the Rajas.

Having regard to all these circumstances, we are unable to hold

that there was a clear assertion in Ex. J2 of Tara Kumari's *complete* separation. Tara Kumari in her petition referred *ghar* Haveli but that we think meant her own Haveli or quarters in *Puranagarh*. She complained of bitter feeling and stated that Rani Kadam Kumari and others were after killing her and her son Nanda Kishore. The defendant contended that there was really no bitterness of feeling between Tara Kumari and Rani Kadam Kumari as the former was drawing her allowance through the latter, that in her petition of objection Kadam Kumari did not show any bitterness of feeling and only accused Tara Kumari's Amlas Uma Chatterjee and others of misappropriation, and that the story of bitterness of feeling was introduced by the *amlas* of Tara Kumari in order to obtain money from the Court of Wards. We think, however, that although Kadam Kumari's allegations were directed principally against the Amlas of Tara Kumari, she was acting upon the advice of the Amlas, that such a serious charge could not have been put forward in a petition presented to the Court of Wards by the Amlas without the knowledge of Tara Kumari, and that there must have been bitterness of feeling though it may have been exaggerated. It is true Tara Kumari was drawing her maintenance allowance through Rani Kadam Kumari but they were co-wives and there must have been some bitterness between them at the time. In 1843 Magan Kumari also applied for Rs. 70 as expenses for the repair of her haveli; Kadam Kumari on being asked about the actual expense stated that the Ranis on the pretext of repairing their havelis instead of spending anything on the repair of the houses had been meeting other expenses with the money—that Rani Tara Kumari had taken Rs. 150 and Rani Hira Kumari Rs. 95 and spent Rs. 10 or 12 for repairs of the *ghars* and misspent the remainder. She stated that Rs. 55 or 56 would suffice for the repair of her *haveli*. The *tehsildar* thereupon was directed to report on the probable cost of building and repairing the *haveli* of the Rani and he reported that Rs. 63 would be required, enclosing an estimate of the costs.

In 1845 again, Tara Kumari applied for obtaining money for repair of "my own *garh*" and furnished an estimate (Rs. 172). The Daroga was directed to submit a report, and he submitted an estimate that Rs. 101-8-0 would be required for repairs and constructing some *ghars*. This expenditure was, accordingly, sanctioned by the Court of Wards.

From 1845 up to 1863 no application for such costs was made by her or by Nanda Kishore. On the 23rd February 1864 Nanda

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Kishore applied to the Court of Wards for Rs. 500 for constructing and repairing* his residence. It was stated that his residence i. e., *garh* being very old, all the houses, walls etc. had become dilapidated and this was a source of great humiliation to him, that it would cost Rs. 2000 or 3000 if all 7 or 8 houses etc. were to be constructed, and even if some were constructed and others repaired it would cost not less than Rs. 500 and that it was with great difficulty that he was making both ends meet with his maintenance allowance. (He also referred to the marriage of his daughter which was to take place which will be dealt with later). The application was rejected on the ground that he was not entitled to get the cost of repairs. Nanda Kishore appealed to the Commissioner (on the 23rd February 1864) on the same grounds as stated in his application to the Deputy Commissioner and wound up his petition thus:—"With the maintenance allowance I have been receiving from the Sarkar it is difficult to maintain myself. I have a *separate garh of my own* and I have all along received the costs of repairs thereof". There is nothing to show what order was passed on the appeal.

It is contended by the plaintiffs that the cost of repairs was disallowed because Nanda Kishore lived separately in a separate *garh* and by the defendant that the Deputy Commissioner being newly appointed to the post did not know the custom. However that may be, the reasons for the rejection are not stated. Nanda Kishore's mother had received the cost of repairs during the minority of Udit and Magan Kumari who was also residing at *Purana-garh* received such costs in 1843. It is also the plaintiffs' contention that they were *entitled* to maintenance which included residence and consequently repairs also.

As stated above, it does not appear that Tara Kumari or Nanda Kishore applied for or obtained such costs of repairs between 1845 and 1864, but it may be that the houses did not require repairs during that period. The petition of Rani Nil Kumari dated the 23rd December 1857 asking for Rs. 1902 for repairs (Exhibit J12) shows that the Rajas' own *garh* was in such a condition that it certainly did require repairs. It was stated that the Rajas' *garh* had not been thatched and repaired and serious loss was being sustained.

Of the period of Raja Rash Behari as already stated, only a few loose sheets of papers have been put in. The account books of Raja Jaimangal's time do not show that Nanda Kishore got costs of repairs from the Raj. In the list of repairs to the Jhe-

ria minors *garh* and bungalows during Raja Jaimangal's minority which gives details of the houses of the minor, there is no mention of Nanda Kishore's houses. But in Raja Durga Prasad's time there are a large number of entries showing that he regularly got such costs, and some entries show that he received money from the Raj for payment of the chowkidari-tax. During Raja Durga Prasad's time Nanda Kishore's dwelling house in *Puranagarh* along with some other properties were attached in execution of a decree by one Fakir Mahomed Sadagar in 1910. A claim was preferred on behalf of Raja Durga Prasad on the ground that it was his *ancestral dwelling house for many generations*, that Nanda Kishore had no interest in it and that it had been in his (Durga Prasad's) *khas* possession for a long time. The last statement viz. that it was in his "*khas* possession" was not correct. The defendant says it was correct as Nanda Kishore was a mere licensee. However that may be, there was an assertion by Raja Durga Prasad that it was ancestral property. The decree-holder gave up the dwelling house and it was accordingly released from attachment. It appears that the claim was preferred by Raja Durga Prasad's Am-muktear during his absence from Jheria, but there is no reason to suppose that he did so without the authority or knowledge of the Raja.

In the petition of Rani Nil Kumari referred to above she stated that "Magan Kumari received some money last year for repair of her own *garh*. She is living in a *separate ghar*" and the Tehsildar's report shows that she had a complete house, not one or two rooms in *Puranagarh*. Having regard to this statement, and to similar expressions in Nanda Kishore's petition there can be no doubt that Tara Kumari (and Nanda Kishore) and Magan Kumari had separate residences i.e. separate from the Rajbati. But the expression "her own *garh*", or "her separate *garh*" in connection with Magan Kumari shows in what sense it was used. It is not the case of either party, nor is there any evidence, that there were any *garh* other than the Raja's *garh* and *Puranagarh*, or that Magan had any *garh* of her own. It seems that the quarters in which each branch lived was called his or her *garh*, and the quarters of each being separate from one another was called his or her "own *garh*" or "separate *garh*" Magan Kumari's Haveli (quarters) was, accordingly, referred to as her separate *garh* and so was Nanda Kishore's. Then again *Puranagarh* itself belonged to the Raj, and the fact that Tara Kumari (and subsequently Nanda Kishore) and Magan Kumari asked for expenses for repairing houses and some-

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times got it, shows that *Puranagarh* was considered to be Raj property. The plaintiffs' contention is that they got costs of repairs not because they were joint, but because by custom they were entitled to maintenance which included residence and as such could claim costs of repairs also. The effect of such custom will be dealt with later.

It appears from a Robakari dated the 19th January 1839 that in order to pay the maintenance allowance of the members of the family of the minor Raja, notices had been issued upon them to state whether they would take their respective allowance from the Court of Wards or through the guardian Kadam Kumari. Magan Kumari applied to get the arrears from the death of Raja Sangram at the rate of Rs. 365 per month *direct from the Court of Wards*. Tara Kumari applied to get the maintenance of herself and her son (Nanda Kishore) *through the guardian* Rani Kadam Kumari from the date of the attachment (Court of Wards taking charge of the estate), Hira Kumari (widow of Pirthi Singh) applied to get maintenance at the rate of Rs. 182-8 for the said period and Rani Kadam Kumari asked for Rs. 2000 as the maintenance of herself and the minor Raja Udit. The Court of Wards held that an allowance could be granted only from the date of attachment, and not from the death of Raja Sangram, ordered Rs. 425 to be paid to Magan Kumari (for herself and her son) and directed that Perwana be issued to Kadam Kumari to pay Rs. 425 to Tara Kumari and her son for the said period, Rs. 212-8 to Hira Kumari, and to send another receipt for Rs. 3175 for the maintenance allowance of herself and the minor Raja including Rs. 200 for Dashara Puja.

The Robakari further shows that the Agent to the Governor-General had ordered a payment of Rs. 500 for clothes to the four sons and three widows of Raja Sangram and it was pointed out that there were other members of the family viz. Rani Jhala Kumari, Rani Chatura Kumari and her daughter and Rani Hira Kumari, and that the sum of Rs. 500 should go to all the members "i.e. the said 11 heads." But as the point was not clear, the Assistant Agent wanted further information. Rani Kadam Kumari by her petition dated the 23rd January 1831 objected to the equal distribution of the allowance for clothes. She stated that raiment was being given to the ladies according to the practice of the family and had been offered to Rani Magan Kumari, but she had refused it and she had claimed 2-7ths of the money, one-seventh for herself and one-seventh for her infant son, that she could not get a share equal to that of the Raja as regards allowance and raiment.

etc. that the Ranis and the Raja's brothers were merely entitled to *Khorposh* (food and raiment) and cannot get an equal share in anything.

The Agent, however, ordered that the sum of Rs. 500 for clothing should be distributed among the minor sons and the ladies of the family in equal shares, that there should be no differentiation in the price of clothes and that the amount due to the minor's shares should be paid to the mother.

It is contended for the defendant that the fact that Tara Kumari elected to take the maintenance allowance (for herself and her son Nanda Kishore) through Rani Kadam Kumari though living in a separate house shows subservience to the head of the family and indicates that there was no separation; and that the fact of equal distribution of clothes among the members of the family shows that they were treated as one family.

Udit attained majority on the 28th April 1847 and took over management of the estate from the Court of Wards. He granted mouzahs Tisra and Golakdihi and one half of mouzah Parashbenia as *Khorposh* to Nanda Kishore by a Sanad on the 31st October 1847. The other half of the mouza Parashbenia and 12 annas share of mouza Dheya were granted as *Khorposh* to Thakur Brojo Lal.

A son Rash Behari was born to Raja Udit in November 1847 and Raja Udit died on the 20th May 1850 leaving this son and his widow Rani Nil Kumari.

The Court of Wards took over charge of the estate in 1850 and framed a scheme of management. The assets of the estate were shown as Rs. 17977 and expenses as Rs. 10392 out of which Rs. 6573 was for khorposhdars. Under the heading 'Annual *Masahara*' the allowance fixed for each was mentioned and Rs. 2190 was fixed for the domestic expenses of the minor and his mother and Rs. 500 for their clothes. A sum of Rs. 400. was fixed for the monthly allowance and clothing of Nanda Kishore, his two wives and his mother Rani Tara Kumari. Similar amounts were allotted for Thakur Brojo Lal and Noonoo Churaman (and their families) and smaller sums for Rani Jhala Kumari, Rani Hira Kumari and other ladies. A sum of Rs. 365 was allotted for the expenses of the daily worship of Lakhi Janardan Thakur and other religious expenses, Rs. 100 for celebration of Rash Jatra, Rs. 200 for that of Dasahara, Rs. 60 for Rath Jatra. The scheme was sanctioned by the Agent to the Governor-General on the 26th July 1850.

On the 13th September, 1850, Rani Tara Kumari submitted a petition to the Court of Wards in which she objected to the

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amount fixed as the allowance to herself and her son and stated that during the minority of Raja Udit an allowance of Rs. 456 a year was fixed for them, that Raja Udit on attaining majority had granted $2\frac{1}{2}$ mouzas (Tisra and others), Rs. 600 in cash and clothes worth Rs. 200 or Rs. 300 every year, that as these even proved insufficient he "would separately pay" the expenses of marriages and religious festivals when these occurred, that Nanda Kishore had come of age and had two wives living, that Raja Udit, who knew all this, granted in mouzahs and in cash Rs. 900 per annum, and she prayed that the allowance might be fixed at Rs. 900.

It is contended on behalf of the defendant that the translation "would separately pay" is not correct, the words in the original being *Kharcha alahida diten* and that it means "in addition to" or "over and above" the maintenance allowance he met the expenses of marriage and religious festivals. The defendant's contention may be accepted though we think that the words as translated also convey the same idea. It is not clear whether the Raja used to meet the expenses by disbursing the money himself or paid money to Nanda Kishore.

The Assistant Agent on the 13th February, 1852 recommended that besides the sum of Rs. 400 an additional sum of Rs. 180 should be paid annually as maintenance for the two wives of Nanda Kishore at the rate of 8 as per diem.

Churaman died in March 1851 and Rani Nil Kumari applied to the Court of Wards for sanction for the expenses of his *Sradh*. Rs. 500 was sanctioned. On Churaman's death the maintenance of Magan Kumari was fixed at Rs. 275. Magan Kumari objected to this. She pointed out that Rs. 400 had been fixed for the maintenance of herself and her son Churaman, that in addition to the allowance of Rs. 400 and Rs. 56-4-0 for clothing and expenses for repairs of her house which she received during the minority of Udit, she and her minor son used to take their meals at the Rajbati, that Udit after attaining majority kept the allowance of Rs. 400 intact, and granted lands for *Khorposh* in lieu of the cash allowance, used to maintain her and her son in the family and she had only to pay the wages of servants, that on Udit's death the Court of Wards fixed the allowance at Rs. 400, that subsequently, Churaman having died, it was proposed to give her only one half of the allowance, and that it would be difficult for her to manage with that sum, as the estate having come under the Court of Wards she was not given meals from the Raj family and she prayed that she

might be granted an allowance of Rs. 400. The Assistant Agent recommended an allowance of Rs. 275 for her. The statement of Magan Kumari that she and her son used to get meals from the Rajbati probably meant that *sidha* used to be sent for them from the Rajbati.

Rani Nil Kumari objected to the allowance of 8 annas per diem to the two wives of Nanda Kishore on the ground that "there was no custom of granting any separate maintenance in case one marries more wives than one according to one's pleasure", that Magan Kumari should not get more than 8 As. per diem and also on the ground that on the death of the Raja, they had become one degree removed.

The agent, however, accepted the Assistant Agent's recommendation and passed orders accordingly.

Brojo Lal.

So far as Brojo Lal is concerned, he was the full brother of Raja Udit, and Gobinda Kumari appears to have lived with her two sons Udit and Brojo Lal in the Rajbati, after Sangram's death. It was only Tara Kumari and Magan Kumari who went to reside at Puranagarh. Mr. Hamilton's Robakari (Ex. K dated the 19th January, 1839) does not mention any maintenance separately for Brojo Lal, and it does not appear that his maintenance was drawn separately from Udit. After Raja Udit attained majority he granted Khorposh mouzas to Brojo Lal, but, as appears from a petition of Brojo Lal dated the 19th February, 1859, he continued to live in the same mess with Rani Nil Kumari even after Udit's death up to 1857. In that petition he stated that Raja Udit used to maintain him with great kindness and affection and this would cost Rs. 100 per month for his food, clothing and wages of servants, that after his death his Rani Nil Kumari living jointly with him in the same mess was bringing him up as it should be, but that "of late about two years ago she made me separate and did not even give any maintenance allowances," that he was in great difficulty as he had not been given a maintenance allowance, and having regard to the habits he had acquired, Rs. 720 per annum should be fixed for his maintenance. The facts that Brojo Lal had been in the same mess with her and that she had separated him were not denied by Nil Kumari in her petition dated the 21st April 1859. There is no doubt, therefore, that Brojo was separated in mess about two years before 1859.

So far as his residence was concerned, his quarters were in the Raja's *garh*, on the south western corner of the Rajbati with a wall between. The Court below has found and the defendant contends

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that Brojo Lal used to live in the same house as the Raja. This is based upon a petition of Rani Nil Kumari dated 18th July 1859 in which she stated that Brojo Lal was staying at a "place within my *garh*" and also upon a passage in a Robokari dated the 12th May, 1857 where it is stated that Brojo Lal was living in the "*Nij Garh*". Brojo Lal's quarters were within the Raja's *garh* but the evidence shows that he lived in a different house, separated from the Rajbati by a wall. In the litigation between Rani Nil Kumari and Brojo Lal notice was served by affixing it on his Suddar gate. The evidence of the defendant's witnesses shows that the house of Brojo Lal and after his death his son Kunjo Behari was separate from the Rajbati. Rani Chatura Kumari says that Thakur Hare Krishna Lal (son-in-law of Brojo Lal) stops at his own father-in-law's house and also with the Rajmata when he comes to Jheria. Kirti Bakshi says that he saw Kunjo Behari's dwelling house—he had thatched huts in his dwelling house—which was in the south western portion of the Rajbati and that *there was a compound wall* around his *garh*; Mukteswar says that Pran Krishna's thatched huts were on the west of the present Thakur Mahal. Behari Lal Singh says that there were 6 or 7 huts—in which Kunjo lived, there was a court-yard in the middle, and there was a partition wall.

Plaintiff's witness Thakur Hare Krishna was asked in cross-examination by the defendant whether the houses of Kunjo were surrounded by mud walls and he answered in the affirmative though he denied that it was called Thakur Mahal.

The defendant's witness Behari says that the partition wall was between the *ghars* of Kunja and the Noonoo of Karangarh but no other witness says so.

In the list of repairs to the Jheria minor's *garh* for the year 1890 (during the time of Raja Jaimangal) Exhibit 33 (b) which gives the details of houses of the Raj *garh*, and bungalows, there is no mention of Brojo Lal's houses but Exhibit F contains entries showing expenses in connection with "thatching the room of Thakur Moni inside the mahal." It is unnecessary to refer to the plaintiffs' evidence that Brojo Lal had a separate house as the defendant's evidence referred to above shows that he had a separate house of his own, though there was means of communication with the Rajbati which was just to its east as appears from the evidence of plaintiffs' witness Lakhan Chandra Roy. The plaintiffs' witnesses Hare Krishna Lal, Lakhan Chandra and Hardyal Singh say that Kunjo Behari had a *Tulshipinda* and Siraghar. There was a *Tulshipinda*, but we are not satisfied that there was any Siraghar.

During the time of Raja Durga Prasad, however, the huts were demolished in 1909 and a two-storied building was erected by the Raja which was called the "Thakur Mahal" (See plaint in a suit by Abdul Rahman against the Raja dated the 25th May 1914 and the Raja's written statement).

It appears from Mr. Oake's letters, dated the 30th May, 1850 that Raja Udit had appointed Rani Nil Kumari and Brojo Lal as trustees and managers of his estate and as stated above they lived in the same mess till some time in 1857. Then there was serious misunderstanding between them after the Rani brought her father Kanai Lal and associated him with Brojo Lal in the management of the affairs of the minor Rash Behari.

Brojo Lal by a petition dated the 19th July 1859 complained of Kanai Lal and the Rani's Dewan Baidya Nath Patnaik having made unauthorised settlement of Nayabadi lands and misappropriated the rents thereof, and made serious charges against Kanai Lal of misappropriation of large sums of money left by Raja Udit and various other charges. The petition was rejected, but the Rani, anticipating that Brojo Lal would move the Commissioner, by her petition dated the 18th July 1859 complained that Brojo Lal had attempted to take her life and cause waste to the property of her minor son, and she, therefore, had brought her father Kanai Lal for her safety, and that Brojo Lal with the object of driving out her father had submitted a petition making false allegations, which having been rejected, he had gone to Ranchi (to the Commissioner) to make various malicious allegations against her, that Brojo Lal had induced Raja Udit to grant a maintenance allowance of Rs. 400 which was excessive. She further stated that Brojo Lal was "staying at a place within the *garh* and the heart of the Thakur is such that he might take my life if he gets an opportunity" and prayed that he might be directed to go out of the *garh* and reside at a distance, "otherwise there is chance of my being suddenly put to death." The Assistant Commissioner held that the matter should not be enquired into without taking a statement from the petitioner (Brojo Lal), but the latter refused to depose, though opportunity was given to him to do so.

It is suggested by the plaintiffs that he did not venture to depose as the charges brought by him were frivolous and were made out of hostility, while the defendant suggests that probably Kanai Lal had made up matters with Brojo Lal rather than face such serious and definite charges. However that may be, the matter

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appears to have been dropped and Brojo Lal died shortly after in 1860.

We have referred to the petition of Brojo Lal, dated the 19th February, 1859 for increase of his maintenance to Rs. 720 in which he complained that the Rani had made him separate and did not even give maintenance allowance. He also made an application for getting his maintenance separately and Rani Nil Kumari was asked to report as to the amount of maintenance and how much was left unpaid. The Rani stated that Rs. 400 had been fixed for his allowance, that Brojo Lal having declared since a year before "that he would receive his own allowance separately," she did not include the sum in her petition or get it.

It appears that Brojo himself asked that he should receive his maintenance separately and the Rani made the same request as appears from her petitions dated the 22nd April and 28th April 1857, so that the separation in mess was the act of both the parties. The plaintiffs contended that the fact that Brojo Lal received maintenance after separation shows that separated members used to receive maintenance, but that is begging the whole question. The question is whether a member separate in mess but in receipt of maintenance is a separated member. This question will be discussed later.

There were several cases between Brojo Lal and Rani Nil Kumari over the paddy of Khamar lands and settlement of some lands of 4 annas of mouza Dheya. It is unnecessary to go into the details. The lands were ordered to be retained in the possession of Brojo Lal until the rights of the parties were decided by the civil Court.

It is suggested by the defendant that there was no bitterness of feeling between Brojo Lal and the Rani, that he spoke of the kindness shown by the Rani who had brought him up, and that his complaints were really directed against her father Kanai Lal and Dewan Baidya Nath and that although the Rani had said much against Brojo Lal, it was they who had caused her so to do.

But having regard to the statements made in the various petitions of the Rani against Brojo Lal and the litigation between them, we are unable to hold that there was no ill feeling. We think that from some time in 1857 the joint messing with Brojo Lal ceased, and that there was ill feeling and litigation between the parties, though it might have been made up just before his death which took place in October 1860.

After Brojo Lal's death in 1860 up to 1888, there is nothing to

show that his son Kunjo became joint in mess again. But reliance is placed by the defendant upon the report of the Deputy Commissioner to the Commissioner dated the 14th September 1888, immediately after the Court of Wards took up the management of the estate on the death of Raja Rash Behari. Paragraph 10 of the letter gives a list of persons whom the widow of Rash Behari had to feed in the same mess with her from the late proprietor's time. Among others there is the mention of the "late proprietor's cousin" and it is said that he was Kunjo.

In the concluding portion of the same paragraph in connection with the cash allowance to Kunjo Behari Singh he is referred to as the "late proprietor's cousin". It seems, therefore, that the "late proprietor's cousin" in the list of persons in the same mess was Kunjo. The name of his wife does not appear in the list. Jointness in food does not mean one member only taking food. But having regard to the fact that Kunjo is referred to as the "late proprietor's cousin" it may be that for some reason or other Kunjo was allowed to take his meals at the Rajbati as his father Brojo Lal did for some time although he received a maintenance allowance.

Marriages.

We will now consider the evidence as to how Nanda Kishore and Brojo Lal's branches were treated in the matter of births, deaths and marriages by the Raj.

The first two marriages of Nanda Kishore and the marriage of Brojo Lal and Churaman took place between 1847 and 1850 during Raja Udit's time. There are no account books of the period of Udit's majority, and there is no evidence to show that those marriages were celebrated by the Raj. But Rani Tara Kumari in her petition dated the 13th September (Exhibit J7) stated that Raja Udit after he came of age paid the expenses of *marriages*, so the expenses of those marriages must have been paid by the Raj. No other marriage took place during Raja Udit's time, but after his death, during the minority of his son Rash Behari the marriage of Nanda Kishore's eldest daughter took place.

We have referred to the petition of Nanda Kishore dated the 23rd February 1864 for costs of repair of his house. He stated "Particularly a daughter of mine has to be married to a zemindar of another place. If there be a gathering of zemindars (on the occasion) they would find no space to stand". The learned Advocate-General contends that the expression *gamanagaman hoile* does not mean 'gathering' as translated, but that the words mean that

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"in case the zemindars visited him" and that the idea was that the zemindars might come for negotiating the marriage and that there was no place where to receive them, not that there was no accommodation in his house, or that there was any idea of the marriage taking place at *Puranagahr*. The literal translation of the vernacular word *gamanagaman* would be "going and coming" and we think it conveys the idea of 'gathering' of the zemindars at his house on the occasion of marriage which it was stated was going to take place in Bysack (April), because evidently Nanda Kishore was trying to make out a strong case for the repairs of his houses and set up the want of accommodation on the occasion of the marriage. The schedule to the petition also shows that what Nanda Kishore wanted was not merely the *baitakhana* (where guests are received) to be repaired but all the houses. The marriage did not take place in Bysack and it must have been put off till June.

The defendant produced a petition of Rani Nil Kumari, dated the 17th April, 1865 (Exhibit J 17) to the Court of Wards stating that the time having arrived for the marriage and Tilak ceremonies of two daughters of Nanda Kishore and the son and daughter of Brojo Lal, engagement for their marriage being entered into according to the custom of the family, an estimate of the expenses amounting to Rs. 19147-8-0 was submitted, and it was prayed that it might be sanctioned, so that she might with her relations—the *Chowrasi gadi*—perform the auspicious ceremonies and thus maintain the *kula dharma* (family custom). The petition was filed on the 17th April 1865 and the estate was released by the Court of Wards in January 1866. It was filed by Ramsaran Roy, Mukhtar who was not her Mukhtar but was the Mukhtar of Nanda Kishore. Ex. J (17) bears the signature of Mr. Money, but his signature does not appear in another copy Ex. J 17 (a) said to be from the same original. The latter bears the seal of Nil Kumari, the former does not. It is contended by the plaintiffs that under section 90 of the Evidence Act there was no presumption about a seal, that the seal used by Rani Nil Kumari was that of Lakhi Janardan Jiu, and that there is no evidence that the Rani had any other seal. The suggestion is that the petition was put in by Nanda Kishore's Mukhtar without the knowledge of Rani Nil Kumari. It appears, however, from a petition filed in the Court below on the 21st May 1841 that the plaintiffs agreed to admit without formal proof certified copies of Court of Wards' papers filed by the defendant (except three documents mentioned therein), Exhibit J 17 was a certified

copy of Court of Ward's papers and was produced on the 12th July 1919. So no proof was required for admitting it in evidence. It is stated by the defendant that as this certified copy did not contain the estimate annexed to Ex. J17 (a), the defendant called for the original in order to get the estimate. The original was produced which consists of two pages both of which contain her seal and signature, and a certified copy of the petition together with the estimate was obtained from the trial Court and kept on the record. There is the initial of Mr. Money on the original, and the certified copy evidently omitted to mention it. The seal probably was omitted by mistake from the copy of Exhibit J17. Ram Saran Roy no doubt was the Mukhtar of Nanda Kishore but it was prayed in the petition that the money might be paid to the Rani's Mukhtar Radhanath Sarkar and Ram Saran Patra on taking a receipt from them. The petition was rejected evidently because an extravagant sum was asked for. A second petition was put in by Rani Nil Kumari on the 15th May 1865 in which it was stated that the amount mentioned in the previous petition being considered heavy, no order had been passed thereon, that her son (Rash Behari) had appeared before the Huzoor and explained that the marriage ceremonies could not be performed unless the reasonable expenses amounting to Rs. 3000 or Rs. 4000 was granted, that the date of marriage had been fixed in Assar (July) and was very close at hand, and it was prayed that Rs. 4000 might be granted. This petition was neither sealed nor signed by Nil Kumari and it is contended that there is no presumption that when an agent files a petition he is authorised to do so. But this also is a certified copy of a Court of Ward's paper which the plaintiff agreed to admit without formal proof. There is no doubt that both these petitions were filed in Court as they are produced from the records of the Court, and Rani Nil Kumari would not venture to recite in the second petition that her son (Rash Behari) had appeared and explained matters to the Deputy Commissioner, a statement which could easily be checked. The explanation given by Rash Behari to the Court of Wards must have had reference to her previous petition.

The Deputy Commissioner in his letter dated the 18th May 1865 solicited sanction of the Commissioner to the disbursement of Rs. 2000 by the guardian Rani for the marriage ceremonies. This order must have been made with reference to the petition of 15th May 1865, so that, the petitions were acted upon, and there is the order of the Court.

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The petition was dated the 15th May 1865 and Mr. Money "ordered after enquiry" on the 18th May that the Commissioner be written to for sanction of Rs. 500 for each marriage. It is said that no enquiry was or could be made within 2 days and that all this might have been done without the knowledge of the Rani.

The Commissioner asked the Deputy Commissioner whether Nanda Kishore had a separate estate or separate maintenance, if so of what value, and also if there was any valid reason for all these marriages being arranged at the same time.

The Tehsildar reported that "the eldest daughters of Nanda Kishore and Brojo Lal could not be kept unmarried any longer according to the family custom, that their marriages had been fixed in Assar (July) and as the younger daughter of Nanda Kishore and son of Brojo Lal had not yet attained marriageable age, their marriage had been postponed for the present year". He gave the value of the *Khorposh* properties and stated that the *Khorposh* was merely for food and raiment, and the Khorposhdars had all along received from the zemindar expenses on the occasions of marriages and deaths besides their maintenance grants, and cited the case of Brojo Lal's *Sradh*.

It is to be observed that this application was made after the quarrels with Brojo Lal, and after the application of Nanda Kishore for repairs in which he stated that his *garh* was separate. If, therefore, they were completely separated from the Raj it is difficult to see how any question of maintaining *Kula Dharma* would arise and why Nil Kumari and Rash Behari should be so keen on obtaining money from the Court of Wards for celebrating the marriage, of their children. The Tehsildar also reported that according to the *family custom* the girls could not be kept unmarried any longer. It is true that under the family custom, the Raj was to provide money for such expenses, but there is no evidence of any custom that the Raj was bound to meet marriage expenses of *separated* members.

The Commissioner on the recommendation of the Deputy Commissioner sanctioned the payment of Rs. 800 to the "guardian and mother of the Jheria minor to enable her to celebrate the marriages of two of her late husband's nieces".

The defendant also produced a letter purporting to be written by Rash Behari (Ex. J20) to the Deputy Commissioner saying that as the 22nd of the "current month" had been fixed for the marriage of his paternal uncle's daughter, the relatives had begun to

come and would come and as it would be difficult to show them proper respect if he was not present at home he was unable to attend a meeting to be held at Purulia about the improvement of agriculture. The letter is dated 14th Assar—the portion of the paper on which the year was inscribed being torn. The body of the letter referred to the Perwana dated the 21st July 1867 and the date of the meeting as 30th July. The order upon the letter “ordered that it may be kept in the Sherista” is dated 30th June, 1865.

It is contended on behalf of the plaintiffs that the letter is not a genuine one. It appears, that there was some correction made in the second portion of the word “July” (জুলাই). The correction seems to be in the same ink as the body of the document and different from that in which the order was written, and it is suggested by the defendant that the correction was made before the letter was put before the Deputy Commissioner. In the certified copy obtained by the defendant in 1919, the year 1272 was there, but the portion containing the year 1272 was found torn in the original when it was produced in Court, though the word *sal* (year) was there.

For reasons stated below, we think that there was mistake in the year and month in the body of the letter and that the date of the meeting was the 30th June 1865.

(1). As stated above, the second portion of “July” was corrected so that it reads like “June”.

(II). 14th Assar the date of the letter corresponds to the 27th June both in 1865 and 1867.

(III). “22nd of the current month” was mentioned as the date of the marriage, 22nd of Assar is the 5th July. If so, the Perwana could not be dated the 21st July and must be the 21st June. Nor could the date of the meeting be the 30th of July because if the marriage were to take place on the 5th July, it would be no excuse for non-attendance on the 30th July, though it might be an excuse if the marriage were to take place on the 5th July and the meeting on the 30th June as some guests had begun to arrive and others would come.

(IV) The Officer of the Collectorate was more likely to put down a correct English date and year than the Amlas of the Jheria estate who might not have noticed the mistake as to the year (1867), and it is to be noticed that all other documents of the estate bear Bengali dates.

(V) Nil Kumari's petition dated the 15th May 1865 stated that

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the marriage had been fixed in Assar and was *close at hand* and the Tehsildar's report also stated that the marriage was fixed for Assar. That evidently had reference to Assar 1272 (June 1865).

The plaintiffs' witness Hare Krishna who married the eldest daughter of Brojo Lal says that the marriage took place in Assar, 1275 (1868) and it is, accordingly, contended by the plaintiffs that the year of the marriage was not 1865. But in cross-examination he said that he was married in Assar and Rash Behari's estate was under the Court of Wards then. Now, the last Assar during Rash Behari's minority was Assar of 1272 (June 1865), and he attained majority in January 1866. The marriage could not, therefore, have taken place in 1867 nor Assar 1275 (June 1868). Hare Krishna was speaking to an event which took place about 55 years before he gave evidence, and though he speaks about many matters of that time he does not remember whether Nanda Kishore's daughter's marriage took place on the same day as his own. He says that Kunjo Behari as the Karta of the bride's party gave Brojo Lal's daughter in marriage to him. But he admits in cross-examination that Kunjo at that time was about 10 or 12 years old. It appears, therefore, that either the witness was speaking falsehood or forgot the year of the marriage which took place more than half a century before.

It is to be noted that one Chakradhar Singh in his affidavit in support of the plaintiffs' application for appointment of a Receiver stated that Nanda Kishore and Brojo Lal had at the time of their daughter's marriage asked for the aid of Nil Kumari and that thereupon the Rani obtained a poor donation of Rs. 200 from the Court of Wards. He says he heard it from them and also from the plaintiffs' pleader and that it could be seen from the Court of Ward's papers. The sum of Rs. 200 appeared in the copy of the order sanctioning Rs. 800 and evidently Chakradhar was referring to this. The figure Rs. 200 was subsequently corrected to Rs. 800 on reference to the original in the Court below. However that may be, the plaintiffs' case as it appears from the affidavit supports the defendant's case as to the two marriages having taken place at the same time. It is to be observed that both according to Rani Nil Kumari and the Tehsildar the marriages of two of the daughters could not be kept back any longer and were fixed in Assar and Rs. 600 was sanctioned for them.

The documents referred to in connection with these marriages show that Rani Nil Kumari applied to the Court of Wards for the expenses, that when the application was rejected the claim being

an extravagant one, Rash Behari himself appeared before the authorities and explained that they could not be celebrated for less than Rs. 3000 or Rs. 4000, that on a report being called for, the Tehsildar reported that the Khorposhdars were entitled to expenses of marriages and *Sradh* in addition to their ordinary maintenance, that on the Deputy Commissioner's report, the Commissioner sanctioned the payment of Rs. 800 to Rani Nil Kumari in order to enable her to celebrate the marriages, and that Rash Behari excused himself from attending the meeting at Purulia on the ground that he would have to be present at his house to attend the guests who were coming on the occasion of the marriages. They further show that the marriage was considered to be very important, not only by Rani Nil Kumari but also by Raja Rash Behari who attained majority a few months later. The letter shows that Rash Behari thought it necessary that he should be present in his house for some days before the date of the marriage as guests were arriving and all these facts make it extremely likely that the marriage took place at the Rajbati, and not at Nanda Kishore's house, more especially having regard to the fact that Nanda Kishore's houses at *Puranagarh* were in a dilapidated condition.

The Court below found that the marriage of Brojo Lal's daughter was postponed, and only one marriage viz. Nanda Kishore's daughter's marriage was performed. That may be so, but the question is not material.

The Tehsildar's report states that the *Khorposhdars* received the expenses, but in this particular case, the money was paid to Rani Nil Kumari to enable her to celebrate the marriages. It is not proved, however, that any expenses were actually disbursed by the Raj in connection with these marriages. As we have already mentioned, no account books of the time of Rash Behari have been produced, only certain loose sheets of accounts of June and July, 1866, and again from December 1868.

During the period of Rash Behari's own management (4th January 1866 to 19th June 1888) several marriages took place :—

Kunjo's first marriage at Joypore, and his second marriage with the mother of Pran Krishna. Nanda Kishore's 2nd daughter was married to Joy Narain Singh of Pandra and his 3rd daughter married to Kali Prasad of Bagiar. Nanda Kishore's sons Lal Behari and Abodh Behari were married at Kisgo. The elder daughter of Raja Rash Behari was married to the Tikait of Jamtara and the younger daughter married to the Raja of Serampore. According to the plaintiffs, Brojo Lal's daughter's marriage took

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place after Rash Behari attained majority while according to the defendant it took place along with that of Nanda Kishore's daughter, during the minority of Rash Behari. Two deaths also took place during this period viz., that of Lal Behari and his wife.

There is no documentary evidence with regard to these events. There is oral evidence, which is conflicting, as to whether the marriages (excepting those of Rash Behari's daughters) and the *Sradh* of Lal Behari and his wife took place at the Rajbati.

It is difficult, therefore, to come to any definite conclusion as to the state of affairs during these years. The plaintiffs contended that Rash Behari had no concern with Nanda Kishore during this period as in his deposition in the Pandra case he said that he did not know the names of the two sons of Nanda Kishore. But probably he was not accustomed to use their proper names and used for them the term 'Noonoo' by which they would be known in the family. He could give the name of Brojo Lal's son Kunjo, but he had made a *khorposh* grant to him. No importance, however, should be attached to the statement made by him in his deposition, because he stated that he did not know the name of his own mother (Nil Kumari who had acted as his guardian for such a long period), nor did he know the name of his 2nd wife's father (Thakur of Mudra). Having regard to all these, no inference can be drawn that Rash Behari had no concern with Nanda Kishore though, in the absence of any reliable evidence, it seems that there was a certain aloofness from Nanda Kishore's family during this period. It is to be observed, however, that there is no suggestion of any separation in Rash Behari's deposition in the Pandra case though he was speaking to the custom of his family.

Raja Rash Behari died on the 19th June 1888 and during the minority of his son Jaimangal, Nanda Kishore's youngest daughter (Janki Kumari) was married to Jagat Narain of Sambandhpore on the 22nd June 1892. Considerable reliance is placed by the defendant on the report of Pores Ghose, Sub-manager of the Court of Wards, dated the 18th June (Ex. G) which runs as follows:—"The Jheria minor tells me that a marriage will take place in his house at Jheria on the 22nd June, and that unless he and his younger brother be there, everything in connection with the matter will run into confusion. I send herewith the ward's mother's report on the subject applying for Rs. 2000. I have recom-

mended for sanction of Rs. 300 only. As regards the minors going home so soon, I have to say that they must be here* at least 7 days before the L. G's arrival". The Deputy Commissioner ordered :— "Yes, they must be here 7 days before, that is on the 30th. Who is going to be married? If a distant connection, the amount required is much too high" (See Ex. G3).

• On the 21st December, 1892, Jaimangal submitted a petition (Ex. J37) that the marriage of his father's paternal uncle's daughter having been celebrated in his (the petitioner's) *house according to family custom* a sum of Rs. 1500 had been expended for the purpose, and prayed for orders sanctioning the same. Thereafter Poresb Ghose submitted a report (Ex. Gi) to the Deputy Commissioner on the 28th December. He recited the fact that he had recommended Rs. 300 in June, that the Board of Revenue had refused to sanction the expenditure on the ground that the relationship between the minor and the bride was too distant to justify the sanctioning of any expenditure and stated "it is, however, the custom of the Jheri a family that all expenses on account of marriages, births and deaths of relations have to be borne by the zemindar and accordingly the marriage in question took place at the minor's residence at (?) expenses incurred by him and his step-mother on loan" and that the Board should be asked to reconsider the question and sanction payment of Rs. 1500 as the expenses incurred for the marriage. The order upon the report was "under the circumstances it is no use sending this up."

Poresb Ghose was examined as a witness for the plaintiffs and although he was cross-examined at great length neither this report nor any question on the point was put to him by the defendant. It is stated, however, that the defendant was not aware of this report till long after Poresb Ghose was examined. His signature was proved by his son who was called by the defendant. The plaintiffs objected to the admissibility of the report in evidence as Poresb Ghosé was alive and was not called, and the statement "The Jheria minor tells me" is hearsay. But it was the duty of the Sub-manager to report to the manager the matters stated in the report and in order to understand Ex. G3 (the Deputy Commissioner's order) the report has to be looked to. The order was shown to Jaimangal (see note—seen J. M. S. 18th June 1892). We think the report of Poresb Ghose is admissible in evidence under section 35 of the Evidence Act.

It is further contended by the plaintiffs that the petition of Jaimangal (Ex. J37) dated 20th December 1892 is not 30 years old,

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and that there is no evidence who composed it (in Bengali). It is signed by Jaimangal in English in an unformed hand, and it is suggested that it was composed with a view to make out as strong a case as was possible. But there is evidence to prove the handwriting of Jaimangal. He was a minor and was at school, but he was about 20 years old (he succeeded to the Raj in the following year).

Presumably he knew the contents before signing it and it is not likely that he submitted the petition without his mother's knowledge. Poresch Ghose in his report dated the 28th December 1872 referred to the Jheria minor's petition for Rs. 2500 for the expenditure incurred by him and his step-mother for the marriage. It appears, therefore, that Jaimangal's guardian and step-mother Rani Gulap Kumari applied for money and the application being refused, borrowed money and celebrated the marriage. There is no entry in the books of Jaimangal's period to show that the loan was paid off but Jaimangal's petition Ex. J37 and Poresch Ghose's report show that the money had been spent and the loan raised. The petition of Jaimangal Ex. J37 is a strong piece of evidence to show that the marriage took place at the Rajbati.

It is contended by the defendant that although there is no documentary evidence to show that the marriage of the 2nd and 3rd daughters of Nanda Kishore were celebrated at the Rajbati or that the Raj bore the expenses, the fact that his eldest daughter was married at the Rajbati as evidenced by Rash Behari's letter (Ex. J20) and that the youngest daughter's (Janki Kumari's) marriage also took place at the Rajbati, (the Raj bearing the expenses) render it extremely likely that the marriage of the 2nd and 3rd daughters also were celebrated in the same way. In the absence, however, of any documentary evidence we are unable to hold that those two marriages or the marriages of other members of Nanda Kishore's and Brojo Lal's branches referred to above took place at the Rajbati and all that we can hold is that the eldest and youngest daughters were married at the Rajbati.

It is contended, however, by the plaintiffs that even if these 2 daughters were married at the Rajbati, no importance should be attached to the fact, as Tope Maya's evidence shows that her sister Gulu was also married at the Rajbati, and in the same *marwa* which was constructed for Raja Jaimangal's daughter's marriage, the Raja bearing expenses of the marriage. Tope Maya's father was a distant agnate of the Jheria Raj; her brothers used to get *sidha* (articles of food) from the Rajbati though admittedly separate; and

it is, accordingly, contended that Tope Maya's marriage shows that marriages of even separated members took place at the Rajbati. The marriage of Tope Maya's sister, however, took place under peculiar circumstances. It appears from the evidence of Rani Chatura Kumari that the girl was the playmate of Raja Jaimangal's daughter, and when his daughter was married to the Tikait of Doranda, Raja Jaimangal suggested that Tope Maya's sister should be married to a Babu who came with the bridegroom's party so that she might accompany his daughter to Doranda. Her marriage accordingly took place in the same *marwa* at the Rajbati 2 or 3 days after the Raja's daughter was married, and at the expense of the Raja. It appears from Rani Chatura Kumari's evidence that a similar thing happened when Raja Durga Prasad married his first wife the plaintiff No. 1 and Dambar Singh was married at the same time so that his wife might accompany Raja Durga Prasad's wife and she serves the Ranis.

In these circumstances, we think that Tope Maya's sister's marriage at the Rajbati does not affect the question. There were other relations of the Raj, though not members of the family, but there is no evidence to show that the marriage and birth ceremonies or *Sradh* of any other relation took place at the Rajbati. Poresh Ghose's report (Ex. Gi) stated that all expenses on account of marriage, births and deaths of relations of the Jheria Raj family are borne by the estate. That must mean relations who are members of the family.

The Tehsildar's report dated the 30th May 1865 (Ex. O3) also stated that the *khorposhdars* all along received from the zemindar expenses on account of marriages and deaths. But the *khorposhdars* referred to evidently were the 3 branches of Nanda Kishore, Brojo Lal and Churaman besides the widowed Ranis Jhala Kumari and others mentioned in the scheme of management dated 22nd July 1850 referred to above.

The expenses of the *diragaman* ceremony of Nanda Kishore's youngest daughter which took place in 1895 was also met from the estate. There is an entry in the accounts of Rs. 100 paid in a lump to Nanda Kishore, and there are also other entries of expenses, such as sums paid for ganja and opium for the Pandra men, price of goats &c. Rs. 200, and expenses of guests from Pandra. After her *diragaman* Janki Kumari used to live at the Rajbati when she came to Jheria, and there are a large number of entries showing her personal expenses during Raja Durga Prasad's time.

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It is to be observed that the plaintiffs' case was that the marriage took place at Nanda Kishore's house. Plaintiffs' witness Kartic Chatterjee at one time Tehsildar of Nanda Kishore, who stated that he was 94 years of age, deposed that Nanda Kishore paid all the expenses of the marriage of his youngest daughter, and that it took place at his house, but when Poresb Babu's report (Ex. Gr) and Jaimangal's letter (Ex. J37) were put to him in cross-examination he said that he could not say and did not know. His evidence on the point is evidently false.

We have referred to Jaimangal's daughter's marriage with the Tikait of Doranda. According to the defendant, two other marriages took place simultaneously with it, and at the same *marwa*, viz. those of Abodh's eldest daughter married at Narainpur and Kunjo's daughter (Pran Krishna's sister) married to the Kumar of Tundi, while according to the plaintiffs these two marriages took place at different times; Jaimangal's daughter was married in Bysack 1306, Abodh's daughter 2 years earlier (1304) and Kunjo's daughter in Assar 1306. Abodh's daughter was married at Narainpur some time in May 1899 (Bysack 1306). There are only two entries relating to this marriage—one being wages of bearers for taking the daughter to Narainpur, and the other the cost of a bedstead and sending it to Narainpur. There are no other entries of any other expense of the marriage being incurred by the Raja. But there are entries of expenses incurred by the Raj relating to her *diragaman* (coming of the bride the second time after the marriage) e.g. expenses of *diragaman* Re. 1, price of Benarasi *sari* for her Rs. 105-0-0, price of vegetables for feeding guests on that occasion Rs. 15, payment to the Raja for giving *Bidai* (parting present) to the "son-in-law of Narainpur Rs. 100" and various other expenses.

A daughter was born to Abodh's daughter, and the *rohars* show entries of payment for gold bangles for the child, price of *alta* for the *Nari dakhina*, for feeding Brahmans and other expenses on the occasion of the *narat* (the ninth day) ceremony of the Bara Nooni (Abodh's eldest daughter), the expenses in connection with the 21st day after child-birth. (The word "son" in some of the entries should be "daughter" as the other entries show). The *diragaman* of Abodh's daughter and the birth of her child however took place during the time of Raja Durga Prasad.

It is pointed out that the entries in Jaimangal's books relating to marriage refer to his daughter only (Nooni mata) and not to "Nooni mata and others" which would have been the case had

three marriages taken place simultaneously, and there were bound to be some items which would be separate, such as presents to the bride, bridegroom &c.

As for Kunjo's daughter, the only entry is dated the 11th April 1899 (29th Chait) relating to the price of 16 tolas of silver for an ornament for her.

*As stated above, there is an entry dated the 21st Bysack 1306 of wages of bearers for taking the Noonni of Kumargarh (Abodh's daughter) to Narainpur. So the marriage must have taken place before the 21st Bysack 1306. But Jaimangal's daughter's marriage took place in Assar 1306 (See Exhibit 1687.—Expenses for going to fetch the bridegroom). It is not therefore clear at all that the 3 marriages took place simultaneously.

Kunjo married for the 3rd time in June 1895 i. e. (within a month of his first wife's death). There are only 2 entries relating to his marriage "marriage (torn) Thakurmoni (Kunjo) as per list Rs. 200" and "paid to Thakurmoni additional expenses incurred for marriage ceremony Rs. 79-3-0."

In Jaimangal's time details of expenses were not given in the account books as in Durga Prasad's time, for instance, under date 30th July 1899 the expenses in connection with Jaimangal's daughter's marriage the entries are "Paid to...for expenses of marriage of Noonni mata. Item 1 Rs. 580, Item 2 Rs. 160 paid to Gokul at the time of marriage, Rs. 100, Rs. 840." But the two entries relating to Kunjo's marriage show that money was *paid to* Kunjo and it cannot be said, therefore, that the marriage was celebrated by the Raj or at the Rajbati.

It is contended by the defendant that if all the three marriages took place at the same time there is nothing strange in the expenses being all debited under the name of the principal person viz. the Raja's daughter. But apart from that, the contention of the defendant before this Court is that Nanda Kishore and Brojo Lal's branches were entitled under custom to expenses of marriage &c. and having regard to the statement in Jaimangal's letter Exhibit J37 that, according to custom, marriage was celebrated at the Rajbati at the Raj expense, and Abodh's daughter's *diragaman* took place at the expense of the Raj, it is difficult to see any reason why the marriage expenses of Abodh's and Kunjo's daughters should not have been paid by the Raj whether or not they were celebrated at the Rajbati. We shall deal later with the expenses connected with marriages and other ceremonies during Jaimangal and Durga Prasad's time.

The learned counsel on both sides discussed the evidence of

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some witnesses. But beyond what has been noticed in our judgment about the oral evidence, it is unnecessary to discuss it as we do not base our judgment upon it.

Sradhs.

During the minority of Udit, Rani Kadam Kumari as his guardian applied on the 23rd January, 1839 to the Court of Wards for expenses of the *Sradhs* of Raja Mohan Singh (the minor's grandfather), Rajas Jarwar Singh and Pirthi Singh, the uncles of the minor. She stated that a sum of Rs. 400 had always been allotted for a *Sradh*, that the *Sradh* expenses were not provided for when the monthly allowance was fixed, that now the time of *Sradh* was near at hand and "if the old practice with regard to the offerings to the dead ancestors be departed from, I shall be lowered in the estimation of my relatives and Brahmans and my family practice (*Kula-Dharma*) will be interfered with." Mr. Oakes the Assistant Agent recommended Rs. 500. It is pointed out by the defendant that the application was made by Rani Kadam Kumari as the head of the family. But the Raja was bound to provide for *Sradh* expenses, and, therefore, Rani Kadam Kumari as the guardian of the minor Raja made the application though the widow of Raja Pirthi Singh (Rani Hira Kumari) and the widow of Raja Jharwar Singh (Rani Jhala Kumari) were alive. It shows, however, that the *Sradh* expenses of Raja Pirthi and Raja Jharwar were not included in the allowance given to their widows and although these ladies were residing separately at Puranagarh, the *Sradh* of their husbands was treated by Rani Kadam Kumari as a family concern.

Churaman died in March 1851, and Rani Nil Kumari applied to the Court of Wards for sanction for the expenses of his *Sradh* and submitted a detailed estimate of expenses amounting to Rs. 986-8-0 on the 10th March 1851. The Assistant Agent recommended after enquiry that a sum of Rs. 500 should be sanctioned.

It is pointed out by the defendant that Churaman was in the same position as Nanda Kishore. They were both residing separately at Puranagarh and if there was any difference it was in favour of Nanda Kishore, because during the minority of Udit, Magan Kumari used to draw her allowance direct from the Court of Wards whereas Tara Kumari drew her allowance through Rani Kadam Kumari. Yet the application for expenses of Churaman's *Sradh* was made not by his mother Magan Kumari but by Rani Nil Kumari as the head of the family, and that these facts were not considered as amounting to separation. The plaintiffs' contention

in this Court at any rate is that, according to family custom, the *Khorposhdars* were entitled to extraordinary expenses such as those for *Sradhs*, marriages etc., and Churaman's *Sradh* expenses were paid under that custom and the head of the family was to find the money; and that there is, therefore, nothing in the fact that the application was made by Rani Nil Kumari. We will deal with the question of this custom later on.

The estimate of costs gave details of the articles required for the *Sradh*, feeding of the people, gift of cows and gifts to Brahmans etc., and it is contended by the defendant that they go to show that the *Sradh* was celebrated by the Raj. The plaintiffs contend that it was necessary to state the details in order to obtain the sanction of the Court of Wards, whether the *Sradh* was celebrated at Puranagarh or at the Rajbati. The Agent sanctioned the "disbursement of Rs. 500 by Nil Kumari on account of the funeral obsequies of the minor's uncle" which rather indicates the celebration of the *Sradh* by the Raj.

During the minority of Rash Behari, Brojo Lal died in October 1860 leaving a minor son Kunjo Behari and widow Purnima Kumari and also a daughter. Notwithstanding that there was ill-feeling between the Rani and Brojo Lal shortly before his death, application was made by Nil Kumari for expenses of his *Sradh*. The Commissioner, on the 5th November, 1860 enquired whether it was obligatory on the minor zemindar of Jheria to perform the *Sradh* of his uncle [Exhibit M (4)]. It was reported by the Assistant Commissioner that "the zemindar of Jheria is bound by family custom to pay any extraordinary sum incurred by his *khorposhdars*" and Rs. 1,000 was recommended for expenses of the *Sradh* which was accordingly sanctioned by the Commissioner.

It is contended by the defendant that the words "pay any extraordinary sum" mean not payment to the *khorposhdars*, but meeting the costs, and that the *Sradh* was celebrated by the Raj. There is no evidence to show that the *Sradh* was celebrated at the Rajbati. The family custom referred to in the report was to pay any extraordinary sum incurred by the *khorposhdars*. But the Commissioner enquired whether it was obligatory on the minor to perform the *Sradh* of his uncle and sanctioned disbursement of Rs. 1,000 to the minor zemindar incurred by him in the performance of the *Sradh* which indicate celebration by the Raj. The fact that a sum of Rs. 1,000 was spent in the *Sradh* shows that the Rani did not consider it as merely a matter of social obligation.

During the minority of Jaimangal, Rani Hira Kumari and

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Nanda Kishore's second wife and Abodh Behari died and the expenses of their *Sradh* which took place on the same day were paid by the Raj Estate (See Pores Ghose's return, dated the 15th May 1893).

Again, when Kunjo's second wife died in 1895 (during Jaiman-gal's time) the expenses in connection with her cremation were paid by the Raj. The *rokars* do not show any entry of expenses in connection with her *sradh*.

During Durga Prasad's time, Kunjo's third wife died (in 1912) and all the expenses connected with her funeral and *sradh* were borne by the Raj. The *rokars* contain entries of minute details of expenses in this connection e. g., carrying her bones (to a sacred place), sending news of her death to relations of the Jheria family, and expenses of her step-son for mourning. Invitation letters were issued to relations connected with all the three branches of the family, the expenses of feeding Brahmans, *dakhina* to Brahmans, wages of cooks, the price of *sandesh* (sweetmeats), curds, vegetables, goats etc., expenses for avoiding *pushkara* (evil spirits), the expenses of religious rights in connection with the *sradh* are set out in detail and there is also an entry of Rs. 679-15-15 as price of articles on account of *sradh* as per *chutka*. These go to show that her *sradh* was celebrated by the Raj.

Lastly, there was the *sradh* of Nanda Kishore, when all the expenses were paid by the Raj. The details are somewhat similar to those in connection with the *sradh* of Kunjo's widow and all the articles for feeding Brahmans and guests, the *bidai* (parting presents) of guests, the expense relating to religious rites, the price of articles required for the *sradh* are all entered in the *rokars*, the total expense being over Rs. 3,000. We need not go into the details but we may mention one entry viz. the price of rice, pulse, ghee etc. supplied to the *bhandar* (i. e. the store room of the Rajbati) in connection with the *sradh* and (*diragaman* ceremony of Chota Nuni Mata) which shows that the *sradh* was performed at the Rajbati.

Khorposh grants and Nanda Kishore's pecuniary condition.

During the minority of Rash Behari, the Court of Wards treated the *khorposh* mouzahs as resumed. The mouzahs, however, were left in the possession of the grantees, rent being assessed thereon and the maintenance allowance was paid in cash. A *kabuliat* was taken on the 13th October 1857 from Nanda Kishore for the rent of half of Parashbenia at Rs. 167-15-6 and it also appears that the rent of Tisra was fixed at Rs. 191 and that of Golakdihi at

Rs. 51, the total being Rs. 409-15-6 ; and this seems to have been sometimes adjusted in the account of his maintenance allowance. Similar settlement was also made with Brojo Lal in respect of half of Parashbenia (at a rent of Rs. 167-15-6) and 12 annas of Dehya at a certain rent. The records show that when they were in arrears the Court of Wards called upon them to pay the arrears of rent.

A number of usufructuary mortgages, simple mortgage and simple bonds executed by Nanda Kishore have been produced by the plaintiffs to show that the pecuniary condition of Nanda Kishore was very bad. It is urged that he was always in want for his family expenses and was not getting help from the Raj. The mortgages and bonds were, however, from 1877 to 1893 i. e., from the latter part of Rash Behari's time up to Jaimangal's attaining majority. The Raj estate was under the Court of Wards from 1888 to 1894 and the Court of Wards would not pay any thing except on extraordinary occasions such as births, deaths and marriages.

In some of the bonds executed by Nanda Kishore it was stated that the money was borrowed for "my family expenses," or the "expenses of my own *garh*." But we do not think that the expressions mean any thing more than "household expenses" of his own. The same meaning should be attached to a similar statement made by Brojo Lal in his petition (Exhibit 118) viz "maintenance of himself, his family and children."

In the bond executed by Nanda Kishore and Abodh Behari on the 1st April 1891 (exhibit 64), mouzabs Tisra and Golakdihi were stated to be a "grant for the maintenance of our family from generation to generation from the Jheria Raj family." It is contended for the plaintiffs that it is an assertion of "our family" as distinguished from the "Jheria Raj family." It does look like a recognition of two separate entities. The vernacular words are "Jheria Raj sansar"; but probably it meant a grant by the Raja of Jheria. However that may be, the document was executed in 1891 i. e. 44 years after the time when separation is said to have taken place, and although a subsequent statement may be taken as evidence of separation having taken place long before [as was done in the *Telwa case* (1)] we have to take other evidence of subsequent acts and conduct into consideration.

It appears from the evidence of plaintiffs' witness Kartik that Nanda Kishore had an income of Rs. 600 and about a thousand maunds of paddy from his khorposh mouzabs, that he was a good

(1) (1915) L. R. 42 I. A. 192; I. L. R. 42 Calc. 1179; 22 C. L. J. 498.

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natured and charitable man, but a gambler and easily cheated. In these circumstances, it is not strange that he was always in need of money for his family expenses. There is no doubt that he was in a distressed condition from the latter part of Raja Rash Behari's time and during the minority of Raja Jaimangal. In 1893 and 1894 he was in such straitened circumstances that he had to borrow very petty sums at a very high rate of interest. In 1901 the Jheria Raj itself had to execute decrees and issue processes of attachment and sale proclamations against him.

In some of the documents executed by him he asserted permanent rights in the *khorphosh* mouzahs after the death of Raja Rash Behari and when the estate was under the management of the Court of Wards during Jaimangal's minority. In the mortgage bond dated 30th February 1890 for Rs. 6000 executed by him and his son Abodh Behari they asserted a permanent saleable and transferable interest in Parashbenia, Tisra and Golakdihi i. e., the *khorphosh* mouzahs; and in the *Amalnama* dated the 1st April, 1891 in favour of Purna Chandra Daw they asserted that mouzahs Tisra and Golakdihi were granted to them to be "perpetually held in their family from generation to generation" and in the *makarari pattah* of the said two mouzahs dated the 1st March 1892 he stated that Raja Udit had made a "rent free permanent *khorphosh* grant".

That *makarari* pattah was in respect of Tisra, Golakdihi (both surface and under-ground) in favour of the same Purna Chandra Daw. On the 13th July 1896, Purna Chandra Daw brought a suit for declaration of his title to and possession of coal land of Tisra and Golakdihi against one Mr. Cohen who had obtained a pattah from certain Mudis who had merely rayati interest and also a settlement of the underground rights in the lands from Raja Jaimangal. Nanda Kishore was made a *pro forma* defendant to the suit. In his written statement, Nanda Kishore set up a permanent right under a *khorphosh* grant dated the 15th Chait 1254. The Court held that the *sanad* produced (by his lessee) was a forged one, and that Nanda Kishore as possessor of a life estate had no right to the coal or the minerals in the mouzahs.

It is contended that the litigation shows that there was ill feeling between the parties but the suit was instituted in July 1896 when Janaki Prasad and Shiba Prasad were living in the Rajbati; and before the litigation ended in 1905, Raja Durga Prasad had got the *gadi* and celebrated the marriage of Janaki Prasad with great pomp. The result of the litigation stated by Raja Jaimangal and carried on by Raja Durga Prasad was that the property was

brought back (Nanda Kishore having already parted with his interest) and it cannot be said under these circumstances that it showed any ill feeling between him and the Raj.

Kunjo Behari also executed mortgages, but he did not set up any right in excess of what he had. Raja Durga Prasad brought a suit for the resumption of the *khorphosh* mouzahs of Kunjo on Jaimangal's death. But that was after Kunjo had transferred his rights and got money and the result was that the property was recovered. That also does not show any ill feeling, and having regard to the manner in which Raja Durga Prasad treated his relations, there could not be any question of ill feeling between them.

A portion of Parashbenia was acquired by the Government under the Land Acquisition Act, and the transferees from Nanda Kishore and Kunjo as well as Raja Durga Prasad claimed the compensation money. The Court of first instance held that the purchases by Rani Tara Kumari and Gobinda Kumari were *Benami* purchases for the Raj and on appeal the case was compromised. This was at a time after Janaki Prasad's marriage and death and while Nanda Kishore was living in the Rajbati.

There is no doubt that Nanda Kishore did assert rights in excess of what he had in the *khorphosh* mouzahs. But that by itself would not show any intention to separate. In the *Serampore case* (1), the plaintiff asserted *separate* estate in the *khorphosh* property but the High Court held that as the deed itself recited that it was a maintenance grant there was no repudiation of the interest of the Raja. "The interest of the Raja would be by way of reversion, and the document expressly mentions that the property is *khorphosh*, it expressly admits the possibility of a right of reversion by the Raja" (See judgment printed in by Vol. D, pages 48, 57, 62 L 24-37, 63, L 45-47, 64, L 1-2). The judgment of the High Court was upheld on appeal. In the present case also, it was also expressly stated in the deed that properties dealt with were granted as *khorphosh*.

In *Sri Raja Viravara v. Sri Raja Viravara* (2), their Lordships observed "It is said that Janardan and his family have dealt with these villages in a manner inconsistent with their holding them for their maintenance only. Their Lordships express no opinion on the point, but even if they have exceeded their rights that will not alter the effect of what was done by the agreement of 1871". We

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(1) (1922) L. R. 50 I. A. 1 ; 37 C. L. J. 287.

(2) (1897) L. R. 24 I. A. 118 (126) ; I. L. R. 20 Mad. 256.

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do not think, therefore, that the setting up of permanent rights in the *khorposh* mouzahs affected the position.

Separate estate of Nanda Kishore and Brojo Lal.

Some of the mortgage bonds executed by Nanda Kishore show that he had separate properties which he dealt with as his own. In one of them (Exhibit 57), dated the 2nd February 1884 mouzah Urbhita is described as a mouzah "purchased by my ancestors at auction sale"; mouzah Urbhita appears to be a Chak included in Parashbenia. The *mokarari* right in Parashbenia was purchased by his mother Rani Tara Kumari and Gobinda Kumari in equal shares (See Exhibit 62). Only the proprietary right i. e., the right to receive rent was granted as *khorposh* to Nanda Kishore and Brojo Lal. In certain Land Acquisition cases of the year 1911 it was held that there was no *mokarari* right, but in the suit for resumption of the *khorposh* mouzahs of Kunja Behari after his death by Raja Durga Prasad it was held that the *mokarari* interest and *khorposh* interests were separate and the latter only was resumed (Exhibit 72).

Then some lands in Belkanali in Nij Jheria and in mouzah Pandulia were mortgaged in the bonds (Exs. 41 and 59) and Exhibit 40. There is nothing to show that the Raj had any share in Belkanali or Pandulia, and they certainly do not form part of the *khorposh* mouzahs. Then again mouzah Amagora "purchased at auction sale by my ancestor" was mortgaged (Exhibit 57). It is suggested by the defendant that the word "ancestral" might mean purchased by his mother. Ordinarily *paitrick* means paternal but the *mokarari* right of Parashbenia which was purchased by Rani Tara Kumari and Rani Gobinda Kumari are also referred to as "Paitrick". However that may be, there is no doubt that Nanda Kishore had separate properties of his own in which the Raj had no share and which was separately dealt with by him as his own.

It is contended that if the family remained joint, Parashbenia having been purchased by Tara Kumari, and Gobinda Kumari the latter's share would have descended both to Raja Udit and Brojo Lal.

On the other hand, it is said that the property was of inconsiderable value and the Raja did not trouble himself about it. But the income of the Raj at that time was about Rs. 17000 only, and the property, therefore, was relatively substantial.

Brojo Lal similarly had some separate properties of his own. In the usufructuary mortgage executed by his son Kunjo Behari in favour of Durga Prasad (then Kumar) on the 29th July 1886 he

mortgaged "auction purchased" 8 annas share of Parashbenia, 8 annas of mouzan Angora 8 annas of Ojhadih, the last having been purchased by Brojo Lal at an auction sale in 1854. It is to be noted that the mortgage was executed in favour of Kumar Durga Prasad Singh himself, mouzah Ojhadih was subsequently sold by Kunjo to one Joy Chandra Roy on the 7th July 1892. It appears, therefore, that both Nanda Kishore and Brojo Lal had separate properties. As already stated, the *mokarari* interest in Parashbenia was purchased by Ranis Tara Kumari and Gobinda Kumari in equal shares. But the other properties are described as ancestral which would ordinarily mean that they were purchased by Raja Sangram. If so, the plaintiffs' case would be stronger. But in any case there is no doubt that both Nanda Kishore and Brojo Lal had separate properties of their own which were dealt with by them without reference to each other and without reference to the Raj. Apart from the impartible estate (the Jheria Raj), therefore, both Nanda Kishore and Brojo Lal were to this extent separate in estate from Raja Udit and his successors. If however as held in the *Gangore case* (1) and the two cases *Yarlagadda v. Yarlagadda* (2) and *Sri Raja Viravara v. Sri Raja Viravara* (3) a partition of partible properties does not effect a separation, the fact that Nanda Kishore had separate properties or that he dealt with them without reference to the Raj cannot, having regard to the other circumstances of the case, effect a separation.

*Personal expenses of Nanda Kishore and
members of his family.*

After Jaimangal attained majority only the maintenance money of Nanda Kishore was regularly paid. The *rekars* do not show any other payment except three petty sums (such as for hooka and tobacco etc.). After Durga Prasad became Raja, however, all his expenses (besides the maintenance allowance) appear to have been paid to him.

The items are too numerous to be mentioned and we will only state the nature of the expenses paid—wrapper, winter clothes, *shawl*, *alwan*, *dhooties*, shoes, milk, lantern, hooka, opium, tea, pigeon, price of *handis* (earthen pots), cost of journey to Baidyanath for fulfilment of vow, cloth for *Janmastamibrata*, price of medicine, the price of one seer of milk for Nanda Kishore besides 2 seers for Janaki and Shiva Prasad (who are living at the Rajoari)

(1) 1875 L. R. 2 I. A. 263.

(2) 1900 L. R. 27 I. A. 151; 1 L. R. 24 Mad. 147.

(3) 1897 L. R. 24 I. A. 118; 1 L. R. 29 Mad. 256.

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and the price of opium was regularly paid. When Nanda Kishore accepted invitations at the houses of his relations, besides all his expenses for the journey, the expenses of peons to guard Puranagarh at night were paid. The price of a horse for his son, of a bullock for his cultivation, of sheep, goats, the cost of repairs (price of straw, wood and wages of labourers) of Puranagarh (sometimes lumped up together with cost of repairs of Raj building), his expenses for going to Ghati (where his eldest daughter was married), to Pandra (where his 2nd daughter was married), to Babinga (his father-in-law's place), the wages of his servants (male and female), his costs at Puranagarh, cart hire for his maid-servants' going home, price of clothes for his maid servants, the expenses of the *parban sradh*, those of feeding Brahmans on the occasion of *tarpan* performed by him, price of sheep for fulfilment of his vow, even the wages of coolies for digging a ditch, for cleaning the rooms at Puranagarh and the price of screws for the door of his privy, the wages of bearers for his and his wife's trips from Puranagarh to the Rajbati, all these and various other expenses were paid by the Raj. In fact, during Raja Durga Prasad's time Nanda Kishore was treated as a member of the family.

The account books of *sikka* of paddy for the year 1314 (1907) to 1316 and 1321 mention the servants of the Raj who get *sikka* annually from the Raj. They contain the names of some of the servants at Puranagarh, the Thakur Mahal as well as at the mahal of Bara Ram (the plaintiff No. 1), of Buri Kumari Saheba (wife of Nanda Kishore) at Puranagarh, some of these signed by Durga Prasad Singh himself.

The diet expenses of the Buri Kumarani (3rd wife of Nanda Kishore) were also paid during Jaimangal's time. She used to get her diet money at 8 annas per diem and occasionally expenses for uftin and wages for bearers from Puranagarh to Rajbati and back. There is a break in the payments between July 1896 and May 1898. The plaintiffs suggested that it was because of the Tisra case. It appears, however, that during the Tisra case some expenses of Nanda Kishore and Abodh Behari's widow were paid by the Raj, and Abodh's daughter was married by Jaimangal, while Jaaki Prasad and Shiva Prasad were being brought up at the Rajbau. In the circumstances, it is difficult to see why the expenses of the Buri Kumarani, the 3rd wife of Nanda Kishore, should be stopped. It is stated that Nanda Kishore and his wife were for some time away from Jhera.

During Raja Durga Prasad's time she used to get not only 8

annas as per diem diet money till the Raja's death, but also her other expenses such as for medicine, hooka, cloth, blanket, sheet, expenses of *Janmastami* (festival), her travelling expenses to her father's house at Bahinga and back, *bidai* for her spiritual preceptor, expenses in connection with her visit to Baidyanath, and feeding Brahmins there, those in connection with visiting other sacred places, price of anklets, *kharoo* and conchshell bracelets for her, price of sheep sacrificed for her vows, and wages of bearers for her coming to the Rajbati from Puranagarh and back—an item frequently recurring.

During Jaimangal's time Abodh Behari's widow (the Dulhin of Kiso) used to get only her diet money at the rate of 4 annas per diem even during the period that the Buri Kumrani was not receiving hers. In Durga Prasad's time besides her diet money (which was sent to her by money-order when she used to go to her father's place at Kiso) her other expenses were paid such as price of conchshell bracelets, cloth, her *bidai*, her travelling expenses to Kiso, expenses of sending *Netpuris* to Kiso and bearers' wages for trips to the Rajbati and back to Puranagarh.

Magan entries and diet money to strangers.

Plaintiffs have relied on a large number of entries in the rokars to show that payments were made to the families of Nanda Kishore and Brojo Lal under the head of *Magan* which, it is contended, means "charity."

For instance, *magan* to Dhibu Noonoo (Shiva Prasad defendant) Rs. 2.

Magan to Chota Thakur (Pran Krishna) Rs. 15.

Magan to Nanda Kishore Singh Rs. 10.

Magan to Thakur Mahal (Brojo Lal's) Rs. 25.

To Noonoo of Narangarh (Abodh Behari's daughter) through Dhibu Noonoo Rs. 100.

Paid as price of Milk for Jita Parab to Nanda Kishore Rs. 2.

It is contended that these payments were all by way of charity.

The Court below observes :—The entries in rokars shown as payments on account of *Magan* go to indicate that ordinarily payments made to a person in a lump is entered as *Magan* when it is not known what use the person getting it is going to put to "amounts paid without specifying the articles to be purchased are shown as *Magan*." This does appear to be correct because although the details are not stated in many cases (such as festive occasions) the purpose for which the payment was made is stated, but we think

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(as contended by the defendant) that the word "magan" is used in the accounts with reference to voluntary payments i.e., the *payments which the Raja was under no obligation to make*. Then the meaning to be attached to "Magan" would vary according to the particular person to whom it is paid. For instance, "Paid to Moharani Saheba (Chatura Kumari) out of Rs 800 on account of Magan for *Sradh* ceremony of her father Rs 100" cannot mean "Charity" to the Moharani. Again, the entry "*magan* for the holy thread ceremony of the son and the marriage ceremony of the nephew of Mahaprayu of Bero Rs 500" cannot mean charity as the Mahaprayu of Bero is the *guru* of the Jheria Raj. It means *pranam* or present. Similarly, *magan* Rs 50 paid to Lalit Kishore Mitra, Vaqil cannot mean charity—it means a present. On the other hand, *magan* of Rs 15 for Meajulla's daughter's marriage is certainly charity. It is, accordingly, contended by the defendant that the mere fact that certain entries of payments to Nanda Kishore and Brojo Lal's families appear under the head of Magan do not show that they were paid by way of charity but were really presents.

Reliance was placed, however, by the appellants upon the statements of Rani Chatura Kumari that payment to members of the Raj family are not *Magan*. But the payment of Rs. 500 to herself for the *Sradh* ceremony of her father (the receipt of which was signed by herself) cannot be held to be a charity payment though it may be so treated as a payment to her brother. In the Court below it was said to have been entered as *Magan* by mistake, but the Amlas have been examined and they have not said so. It is to be noted however, that no expense on account of marriage, birth, *sradh*, *upanayana* and *diragaman* etc., i.e., cases in which it is obligatory on the Raja to make payments is entered as *Magan*. There is one solitary entry Rs 15 to Nanda Kishore as *gami* (death). It is suggested by the plaintiffs that it was on the occasion of the death of Abodh's little child who died about that time according to Rani Chatura Kumari's evidence but there is nothing to connect the two, and it is suggested by the defendant that it might have been paid to some servant of Nanda Kishore or some poor men for whom he had paid. Having regard to the fact that there are numerous entries of expenses paid in connection with births, deaths and marriages none of which is entered as *magan* the solitary entry cannot affect them more especially as Nanda Kishore and Brojo Lal's families were, according to the contention of the plaintiffs themselves, *entitled* to such expenses under custom.

It appears that diet money was paid to distant relations and who

are described some times as *khorphoshdars*. There are a large number of entries showing payments to the Thakur of Karangarh, generally at the rate of 8 annas, and to the Noonoo of Karangarh son of Chaunaraj Singh of Karangarh (Rani Gobinda Kumari's brother's son) at the rate of one rupee and some time at the rate of Rs. 2 per diem in the year 1894 and also in the year 1896-1897. Mami Lal an illegitimate son of Raja Rash Behari used to get diet money, it is not clear at what rate, but it is a small amount, per mensem. Surjalal Singh another illegitimate son used to get it at the rate of Rs. 12 a month. There are other caste people who were supported by the Raj and got regular diet expenses, for instance, Prayag Singh Babu (the rate is not clear) Damar Singh Babu, Puro Singh Babu (a cognate) Bramho Singh Babu and Parso Singh Babu (a cognate). But no *custom* of payment to such persons has been alleged or proved, and there is nothing to show that they had any *right* to such payments. In their case the payment was by way of charity. The members of Nanda Kishore's and Brojo Lal's branches, on the other hand, were *entitled* under custom to get maintenance and that shows the difference between the two classes of cases.

Besides diet money it appears that the Jheria Raj paid various kinds of expenses not only to the members of Nanda Kishore's and Brojo Lal's branches, but to other people also not only during the time of Raja Durga Prasad but even during Raja Jaimangal's time. There are entires of costs of house repairs, for religious festivals, births, deaths, marriages, *sraddh*, Durga Puja, Kali Puja and Saraswati Puja, and miscellaneous expenses. These payments were made to persons related by marriage, agnates or other connections, servants and dependants, school boys and even strangers. There are numerous such entries, and sometimes substantial amounts were paid. It is, accordingly, contended for the plaintiffs that the fact that the expenses of Nanda Kishore's or Brojo Lal's branches were paid does not show that they were joint. There is no doubt that similar payments were made to others, but with this important difference that in the case of Nanda Kishore's and Brojo Lal's branches they were during the time of Raja Durga Prasad far more numerous and regular, the only exception being in the case of Larumoni with respect to whom there are also numerous entries. Then, again, with regard to the expenses connected with births, deaths and marriages, i. e., the extraordinary expenses in these two branches they got the expenses *as of right* and not by way of charity, and there can be no comparison between them and the other persons referred to

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above with regard to such expenses, Larumoni not excepted. We do not, therefore, think it necessary to go into the details of the expenses paid to the other persons.

Buri Bhanas.

The defendant produced a slip book of the *Sarkari Bhanas* (kitchen) of the time of Raja Jaimangal Exhibit Y series. We would refer to one or two slips to show the nature of the entries. Exhibit Y (1), dated the 25th October 1896 mentions expenses on account of Rani Mata (wife of Raja), Raj Mata (the mother of the Raja), Kumar Saheb (Durga Prasad), Nuni Mata (daughter of the Raja) Sukermoni's mother (kept woman) Sukermoni, Sahajadi (kept woman) 4 persons of *Puranagarh* and boys of Thakur Mahal. The quantity of rice, *dal*, salt and spices, oil, *ghee*, together with the price thereof are entered in these slips. In some others, again, amounts in cash are entered e.g. sons of Thakur Saheb 8 annas. These slips were issued by the Raj upon one Chandra Mohan Kar who used to supply the articles for the kitchen.

They were relied upon by the defendant to show that members of Nanda Kishore's and Brojo Lal's families used to have cooked or uncooked food from the Raj kitchen.

On behalf of the plaintiffs it is stated that there were two kitchens, one the *sarkari* and the other the *Khas Bhanas* i.e. the Raj kitchen.

It appears, however, from the evidence of Rani Chatura Kumari that some dishes were prepared at the *sarkari Bhannas* and then sent to the inner apartments of the Raj where special dishes were prepared for the Raja and his family. Cooked meals were sent to Kunja Behari's house and to other persons mentioned in the list. Dry (uncooked) articles of food seem to have been sent to *Puranagarh* (Nanda Kishore's house) during this period.

It is contended for the plaintiff that neither the proper custody of this slip book nor the handwriting of Kali Charan Mahata who wrote them has been proved. But they are counterfoils of slips issued by the Raj and have been produced by the Raj. They, therefore, came from proper custody. Kali Mahata is said to be siding with the plaintiffs and his handwriting is proved by Jogeswar Prasad Mohuri and we do not see sufficient reasons for rejecting them. As stated above, uncooked foods sometimes seem to have been sent for four (sometimes three) persons of *Puranagarh*.

Then there is a *pahana* book (list of guests) of the time of Raja Durga Prasad. Exhibit 1503 mentions the names of guests coming from different places and the name of Bara Kumar Saheb (Nanda

Kishore), Dulhin Saheb of Puranagarh appear along with those of the other guests. There are a number of such entries. It is said for the defendants that *pahanas* means persons connected by marriage, and as Nanda Kishore was not so connected, the expression *pahanas* was loosely used as indicating merely those who were dining temporarily and that it showed that Nanda Kishore used to come and stay at the Rajbati.

The defendant also produced an account of daily expense of the Raj for 1910 (Exhibit Z 242) showing the rice, salt, oil, etc., for the dishes, of the members of the Raj family, Nanda Kishore, Pran Krishna, and his wife, Janaki Prasad and his wife, Shiva Prasad, Jagananda, Hardyal and his wife and others, and also a list of expenditure of kerosine oil from the stores of the Raj in which oil for one lantern for Puranagarh is mentioned. Excepting the slip book of the *Sarkari Bhanas*, however, the other account books are of the period of Raja Durga Prasad.

Durga Prasad's time.

Durga Prasad became Raja on the death of his elder brother Jaimangal in September 1899. During his time the income of the estate increased enormously. From Rs. 7,000 at the time of Raja Udit, and Rs. 17,000 during the time of Rash Behari, the income swelled to ten lacs a year, and money was pouring in thousands as bonus for coal lands. A palace was built and valuable furniture was purchased during his time. He was very generous to his relations and to strangers also. The evidence shows that he looked upon Janaki Prasad (the eldest son of Lal Behari and grandson of Nanda Kishore as his heir. The plaintiffs' case was that he was entreated by Nanda Kishore and his wife to take him to the Rajbati and maintain him and he was, accordingly, taken there by Raja Durga Prasad. But, as a matter of fact, Janaki, went to reside at the Rajbati during Jaimangal's time in 1894-95 and Shiva Prasad came the next year (1895-1896).

The *chit* book of the *Sarkari Bhanas* for 25th October 1896 to which we have already referred mentions the Rani Mata, Raj Mata, Kumar Saheb (Durga Prasad) and other persons including "four persons of Puranagarh and boys of Thakur Mahal." The four persons of Puranagarh must be Janaki and Shiva Prasad and probably two females of Nanda Kishore's family.

There were a number of boys who attended school and resided at the Rajbati. Among them were Janaki Prasad and Shiva Prasad and Satya Narain (maternal cousin of Krishna Prasad). The defendant's contention is that they were all "maintained out of charity."

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During Jaimangal's time the entries relating to Janaki Prasad are few—mostly relating to price of books, papers and school fees. Some of these expenses appear for Janaki Prasad as well as Satya Narain besides a few items for "gurnsey frock," blanket, dhuty, chadar, and pugree for Janaki Prasad, shoes, wrapper for Dhibu Noonoo (Shiva Prasad), price of padlock for him and one or two other items for him. There are, however, entries relating to the purchase of books and examination fees for other boys (Hira and Dukhi Lal), shoes for Satya Narayan and others, blanket for Larumoni (Rash Behari's wife's sister's son), cloth for Mati Lal and so on. During Jaimangal's time, therefore, there was little difference between Janaki Prasad (and Shiva Prasad) and the other boys who lived at the Rajbati. For the first three or four years after Durga Prasad became Raja Janaki Prasad (and Shiva Prasad) used to get education expenses along with other boys, but they also get some other personal expenses, such as for shirts, cloths, lantern, medicine etc., and there were some cash payments to Janaki Prasad for his expenses. It is stated on behalf of the plaintiffs that the amount received by Janaki Prasad in 9 years from 1894 to 1902 would work out at only Rs. 3 or 4 per month. But from 1903, there was vast difference between the treatment of Janaki Prasad and that of the other boys. Since then all possible expenses of Janaki Prasad were paid by the Raj. They are too numerous to be mentioned, the abstract alone of the items (prepared by the defendant) covering 43 printed pages. We will only state some of the items which will give an idea of their nature—shirts, dhutis, cloth and cotton for quilt cover, comforter, coat, tailor's charges for making shirts and coats, endi cloth for coat, silk umbrella, silk shirts, silk bordered dhutis, shoes, slippers, bed sheets, "gurnsey frocks", blankets, costs of washing clothes, betel leaves, hair oils, soaps, soal cakes, steel trunks, screws for framing mirrors, bell metal utensils, soda, parcels of books, playing cards, butter, milk vegetables, pomegranates, goats, pigeons, tickets for theatre, expenses for hunting expeditions, wages for pulling his punkha, expenses of his going to Pathrole and other places, price of gram for elephants and horses during his stay at Tisra, his expenses (and those of seven others) when invited to the *diragaman* of the Raja of Nawagarh, his expenses connected with his wife's *diragaman*, sheep for fulfilment of his vows, price of *hosa* and *kusi* for worship, expenses for his (and other members of the family) going to Prayag (Allahabad), expenses in connection with Tij festival, silver for anklets and clothes ordinary and

silk bordered for his wife, barley and tumbler for his wife (asked for by her) feeding bottle for his son, suit of garments and *kurta* for his son, "rope for rocking cradle for the son of *Chota Thakur*" (Pran Krishna) in the *rokar* is evidently a slip for Bara Thakur (Janaki Prasad) as the former was not married till 2 years afterwards. (It is referred to by the Court below as anachronism), silver and gold for his son's ornaments, doctor's fees for his treatment and that of his son, expenses of his wife's visit to Bharkata (her father's place), betel, tobacco, and sweets sent to Bharkata, wages of masons and labourers for erecting the compound wall of his wife's Mahal (in the Rajbati), price of *luchis* and sweets for feeding Brahmins. Besides these, there are many cash payments for his expenses.

The account of daily expenditure from the Raj stores show daily provision of fine rice, flour, *ghae* etc., for him and his wife. Kerosine oil was supplied for him from the Raj stores.

With regard to Shiva Prasad also, there are entries which are similar to those in connection with Janaki Prasad. In Jaimangal's time the items are few, but in Durga Prasad's time they are numerous and as they are similar to those in the case of Janaki Prasad (except the expenses relating to his wife and son) we will not refer to them. He was also paid a cash allowance of Rs. 5 per diem.

We do not find anything like this in the case of Larumoni or any other person. As for the "charity boys", only the expenses for and incidental to their education were paid.

The expenses connected with the *tilak* (betrothal) and *upana-yana* of Janaki Prasad again show how he was treated by Raja Durga Prasad. The expenses in connection therewith are mentioned in detail in the *rokar*s. Such detailed expenses are to be found only in the case of Pran Krishna and others—the members of Nanda Kishore's and Brojo Lal's branches; the only exception was the Nuni of Joynagar, who was a stranger to the family, but whose maintenance and marriage expenses were taken upon himself by Raja Durga Prasad. Janaki's *tilak* took place in 1903, and he was married in 1904. The marriage was performed on a grand scale. The entries are too numerous to be mentioned, they give every detail of the expenses incurred and the details leave no doubt that the articles necessary for it were purchased by the Raj itself. We quote only a few petty and a few big items. Raja Durga Prasad himself went to Bharkata (the bride's place) and a bioscope and dancing girls were brought from Calcutta and elsewhere. The Head Master of the Jheria School (of which the

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Raja was the secretary) was desired by the secretary to close the school on Monday, the 27th on account of the marriage ceremony in his family (see notice book of Jheria School, dated the 25th July, 1903).

The plaintiffs' case is that Raja Durga Prasad was fond of amusement, and as by this time the estate was freed from debt and surplus funds were accumulating in his hands, he took the opportunity of making himself merry. The plaintiff No. 1 says that Nanda Kishore was in very straitened circumstances, he could not perform the *upanayana* of Janaki Prasad and he requested Raja Durga Prasad, who always helped poor relatives and kinsmen, to see Janaki's *upanayana* celebrated.

But a summary of the expenses will show that the amount spent on amusements was only a small fraction of the total expense :—

Carrying tents to Bharkata and back	Rs ...	90
Benarasi Sari and other articles ...	... ..	3270
Band from Calcutta	... ..	150
Betel leaves	... ..	162
Nautch girls	... ..	591
Raja took with himself to Bharkata	... ..	3500
Rasad at Bharkata	... ..	150
Clothes for servants	... ..	148
Chira	... ..	74
Ornaments	... ..	915
Fire Works	... ..	328
Expenses of bridegroom	... ..	325
Other miscellaneous expenses—	...	
flour, ghee and other articles of food	... ..	3043
Goats	... ..	225
Bioscope	... ..	65

Offerings of *Naivedya* for the worship of various deities through priests were made on the occasion of the marriage among others at the *sthan* of Nilkantha Bashini, Bansbuda (the Bastu deity of Jheria Raj), offerings of sheep and goat at the *sthan* of Bansbuda and Kali etc., rice offerings to Nilkantha Bashini and other deities. *Pronamis* were paid to the *Thakurbari* (Lakhi-Jonardan the Raj deity) the *kuthari ghar* (Siraghar), Nilkantha Bashini and Durga Mela and Bansbuda (the bastu deity) at the rate of one rupee each, and various other deities at the rate of 4 annas each.

It is to be observed that according to the plaintiffs' witness Hardoyal the custom is to pay *pronamis* to all deities and *Naivedyas* are offered to the deities whenever the marriage of any

member of the Raj family takes place, and that *pronamis* were not paid to the *kuthari ghar*, Bansbuda and *Thakur ghar* on the occasion of marriage of the members of Nanda Kishore's family. The entries in the books however show otherwise.

All the relations were invited—Those of Mudra (Rani Golap Kumari's father's house), Pahardaha (Plaintiff No. 2's father's house), Nunyad (Plaintiff No. 1's father's house), Bahinga (Nanda Kishore's father-in-law's house), Kisgo (Janaki Prasad's mother's house), Chura (Jaimangal's father-in-law's), Narainpur (Abodh Behari's first daughter's father-in-law's house), in the same way as relations would be invited if the marriage were that of Raja Durga Prasad's son or brother.

It is not denied on behalf of the plaintiffs that the festivals took place at the Rajbati. But the plaintiff No. 1 stated that the *marwa* was erected, and the auspicious ceremonies incidental to the marriage such as puja &c., were performed at Nanda Kishore's house, and the feeding of relations &c., took place in the Rajbati as Nanda Kishore's house was small, and thatched with straw and in a dilapidated condition, that the bride and bridegroom after the marriage went to the house of Nanda Kishore and did not come to the Rajbati, but that at the request of Nanda Kishore came to the Rajbati subsequently. Some other witnesses for the plaintiffs also say the same thing. On the other hand, Rani Chatura Kumari says that the *marwa* was erected and the auspicious ceremonies were performed at the Rajbati. But the entry "wages for female labourers for filing up (illegible) of the *marwa* ghur for the Thakurmoni's marriage Re. 1-2" shows that the *marwa* was erected at the Rajbati. The entry of "Betel and tobacco for the Thakurani Saheb Re. 1" shows that the bride must have come to the Rajbati and it is not likely that the marriage having been performed with pomp, the bride and bridegroom would go to Nanda Kishore's dilapidated huts. Jagabandhu Roy says he did not know if Janaki's wife came to the Rajbati, but in his letter dated the 26th July to Gokul Chandra, tehsildar he wrote that "the bride and bridegroom reached the *garh* yesterday so there is a great rush of people to-day and there is no end of expenses." The *garh* certainly means the Rajbati and not the huts of Nanda Kishore.

Hardayal Sing says that at the time of the marriage, Janaki lived at the Rajbati, but he saw the "bridegroom after saluting the *Siraghar*, was coming out" from Nanda Kishore's house. That is not impossible because on such an auspicious occasion Janaki might have gone to Puranagarh to bow to the deities there before starting

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for the marriage procession. But there can be no doubt that the *marwa* was prepared and the marriage was celebrated at the Rajbati.

Plaintiffs' witness Jagabandhu Roy (who was for sometime manager under Raja Durga Prasad) says that he suggested that Rs. 1,000 should be given in cash to Nanda Kishore, but Raja Durga Prasad said that the views of the Rajmata (Chatura Kumari) and the Maharani should be respected, that Nanda Kishore would squander the money if cash payment was made and that therefore the expenses should be disbursed from the Rajbati. Jagabandhu says that he prepared an estimate of Rs. 2,500 or Rs. 3,000, 10 or 12 days before the marriage, and the Raja agreed to it. That would be about the 10th of July as the marriage took place on the 22nd July. But two months before the marriage 7th Jyest 1310 (21st May 1903), there is an entry of Rs. 950 for ornaments for the marriage. The Tilak (betrothal) took place about a year before, and there is an entry dated the 1st June of Rs. 3000 for purchasing Benarasi cloth for the marriage. In his letter to the Mukhtear at Purulia on the 22nd June Jagabandhu himself wrote that "just now there are various items of indispensably necessary expenditure to meet and yet the Raja Saheb is spending all money on marriage &c" and on the 18th July wrote to the same mukhtear that "there is a marriage here Rs. 12000 has already been spent and Rs. 5000 to 6000 more will be spent owing to pressure of work on account of marriage &c." On the 27th June he wrote to Babu Jogesh Dey, Vakil that there are several *upanayana* and marriages in the Rajbati and money could not be sent for costs (of an appeal pending in the High Court). It is impossible, therefore, to accept the statement of Jagabandhu that he prepared an estimate of Rs. 2000 or 2500 and that only 10 or 12 days before the marriage.

The *upanayana* of Janaki also took place at the same place just before the marriage and as the proper age of *upanayana* had passed, *Prayaschitta* had to be performed and there are entries with regard to articles required for that ceremony, payment to the priest in respect of religious expenses connected with the *upanayana*, and *Dakhina* to Brahmans who officiated at the ceremony, cost of erecting a shed for the *upanayana*, offerings of *Naivedya* at the Thakurbari, *Kuthari Ghur*, Nilkantha Bashini and even to the deities at the houses of other persons. Then again the *Bhikha* (alms given to the boy invested with sacred thread at the time of *upanayana*) by relations and others (amounting to Rs. 30-13-3 were credited to the Raj estate, the Raja himself paid Rs. 100 as *Bhikha*.

All these show that the *upanayana* and marriages of Janaki Prasad were celebrated just as they would be done in the case of a member of the family, and there can be no doubt that they were celebrated at the Rajbati.

When Janaki went to bring his wife in *diragaman*, his expenses for going to Bharkata and price of silver ornaments and sweets sent to that place were all paid by the Raj. A son was born to Janaki in October 1904 and there was great rejoicing on that occasion. Information was sent to all relations and neighbouring Rajas and the entries show that the child was born at the Rajbati, the expenses in connection with the lying-in room—the sixth day and the ninth day ceremonies—the articles required for those ceremonies, the fees of the priest, the feeding of guests, *bidai* (parting presents), ornaments and satin for the cap of the child, payment of girls for dancing were all paid. The plaintiff No. 1 says she never saw the child, but there is an entry showing that gold ornaments were prepared for the Raja and Rani's seeing the child for the first time. In connection with the *annaprasana* ceremony (the first taking of rice by the child when six months old), there are entries of expenses of Poojahs offered to family Gods and other religious expenses in connection with the ceremony, fees for officiating Brahmans, ornaments for the baby, gold for enlarging his bangles, and feeding bottle for him. The child fell ill and a doctor was brought from Dhanbad. The boy however died, and there are entries showing expenses in connection with his cremation and feeding of relations on his death. Janaki himself died on the 11th February 1911. The cremation expenses and those for casting his bones into the Ganges at Tribeni were paid. The news of his death were conveyed and invitation for his *sradh* sent to all the Rajas connected with the Raj, all the relations of the Raj and the 3 Ranis, all persons connected by marriage with the family, and the family Guru (the Gossain of Bero). All expenses in connection with the *sradh* for example—"Price of buckets for keeping things in the store house at the Rajbati," *Atap Chira* for Dhibu Noonoo (Shiva Prasad the defendant), fruit for the widow of Janaki (who were in mourning), price of logs for preparing a shed for the *sradh*. All articles of food, goats, vegetables, *luchis*, *sandesh*, all *sradh* expenses, Dakhina for Sapindikaran *sradh* for 12 months, *Bidaya* to relations and invited guests, these and many others are shown with the minutest details. Rs. 1516-12-0 appear to have been spent in the *sradh*. *Netpuris* (presents by relations and other invited persons) on the occasion

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of the *sradh* were received by the Raja (the list of articles is signed by the Raja himself and distributed by him to others, and the *saris* sent to the Zenana).

After the death of Janaki his widow gave birth to another son on the 1st August. Thereupon messengers were sent to Bharkata and other relations with the news of the birth. Janaki's widow died on the 6th August and her bones were sent to Tribeni. The 6th day of ceremony of the child and the Poojah were performed. The entry in the book of articles supplied daily from the store room of the Raj (Item No. 30) shews that articles were supplied for 2 sentries retained for guarding the child—but the child having died on the 8th Bhadro it was stopped. Then there are a large number of entries relating to the *sradh* of Janaki's widow. All these show how Durga Prasad treated Janaki, his wife and his sons.

It is contended, however, by the plaintiffs that Raja Durga Prasad was a generous man and helped other persons even strangers on occasion of marriage, births and deaths by way of charity. It is true that he did so. The account books contain many entries of such charitable gifts as already stated. But there can be no comparison between the payments made to outsiders, and the expenses incurred for the members of Nanda Kishore's and Brojo Lal's branches. Leaving aside outsiders, there were Janaki Prasad, Shiva Prasad, Pran Krishna, Jagananda, and Bhola Prasad and Krishna Prasad belonging to those branches. They were treated by Raja Durga Prasad more or less in the same manner, with a difference in favour of Shiva Prasad whom he looked upon as his heir.

The payments to other relations (not belonging to the Jheria family) and strangers were lump sum payments. No details are given, nor were the expenses disbursed by the Raj and beyond the payment (in a lump sum) to the particular person, the Raj had no connection with the details of the expenditure.

In the case of the 6 persons mentioned above, especially in the case of Janaki Prasad's *upanayana*, marriage etc., all the expenses were met, and the monies disbursed and the ceremonies celebrated by the Raj. There is, therefore, an essential difference between their case and those of other relations and strangers to whom payments were made by way of charity.

There were, however, two exceptions, one was Hardoyal (Larumoni). He was the sister's son of Rani Golap Kumari (wife of Raja Rash Behari). He came from a very poor family and Rani Golap Kumari at the request of her mother brought him to Jheria when he was 12 years old, brought him up, and kept him in

her own quarters. All his expenses were paid by Raja Rash Behari. He was for a time Tehsildar under Raja Rash Behari and subsequently with Durga Prasad took a lease of coal lands from Raja Jaimangal and was also a Mosaheb (companion) and *am-mukhtar* of Durga Prasad. But although all his expenses were paid, those on the occasion of marriage and *Sradh* were paid in a lump. He was paid Rs. 700 for his mother's *Sradh* and only Rs. 600 for his and his brother's marriage under the heading "*Magan*" (charity) and the ceremonies were not performed at Jheria. There is therefore an essential difference between his case and that of Janaki Prasad and others.

The other exception was in the case of the Noon of Joynagar. Raja Rash Behari purchased Pergannah Joynagar. The family of the ex-zamindar was in a destitute condition, and Raja Durga Prasad took upon himself to support this family. The expenses of the daughter of the zamindar (the Noon) were paid by the Raja Durga Prasad, and sometimes he paid her maintenance expenses. Her *tilak* and marriage were celebrated at Joynagar—all the expenses being met by the Raj. In the *tilak* Rs. 1000 was paid, the family priest was sent from Jheria to Joynagar and on the occasion of marriage there are entries relating to price of goats, betel, gunja, opium, sweets, milk, oil, fish, curd, *chira*, whisky, soda water, gold for ornaments and silver for a cup and various other articles sent to Joynagar in seven bullock carts. Raja Durga Prasad himself went to Joynagar and there is an entry of Rs. 500 for his going to the marriage. The rokars give the details of the articles sent for that marriage. They show that she was treated on a better footing than Hardoyal, but her case was a special one. Even her case was different from that of Janaki Prasad or the other members whose marriages and *Sradhs* &c., were celebrated by the Raj.

Pran Krishna's marriage took place in 1906 at Pahardaha with a sister of the 2nd Rani of Raja Durga Prasad. All the expenses were paid by the Raj. We will only refer to some large items—Price of *Saris* on the occasion of the marriage Rs. 2120, clothes purchased for the ladies of all three branches (similar purchase on the occasion of Durga Prasad's marriage with the 3rd Rani Hem Kumari), articles purchased at Calcutta. Expenses of procuring articles at Pahardaha at the marriage Rs. 1000, price of gold and silver ornaments Rs. 607, price of rice paid in advance Rs. 1500, goats Rs. 150, fire-works Rs. 15, wages of bearers and porters Rs. 117, wages of bearers for bringing the bride, cost of

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the *Nandi Mukh Sradh*, *pronami* to the spiritual guide, paid to Raja Durga Prasad on account of expenses when he went to Pahar-daha on the occasion of the marriage Rs. 3000. The expenses of entertainment of guests, feeding of Brahmans, *bidais*, fees of the priest, the price of offerings, *dakhina* &c., were all paid—the total cost amounted to Rs. 10256-1-15. The details are all given in the Chutkas.

Similarly, at the marriage of Krishna Prasad which took place in August 1913 with a neice of the first Rani (the plaintiff No. 1) all the expenses were borne by the Raj. Dancing girls and bag-pipe players were brought from Calcutta, a special train was engaged for conveying the bridegroom's party. The payment of the price of articles for the *Nandi Mukh Sradh*, price of flour, *ghae*, vegetable, for the stores at the marriage, the costs of erection of a shed, wages of cooks, whitewashing the bridal chamber, and other items show that the marriage was celebrated at the Rajbati. The total cost was about Rs. 10000. The expenses of *diragaman* of the wife were also paid by the Raj and when a daughter was born to Pran Krishna the expenses in connection thereof were borne by the Raj.

Lastly, we find similar expenses were paid at the marriage of Jagananda (Fakan) who was married to a relation of the plaintiff No. 3. The family appears to have been poor and Raja Durga Prasad paid the expenses of the bride's father also. Relations were invited. The expenses were similar to those incurred in Krishna Prasad's marriage (except the special train) and we need not go into details. The total expenses come up to Rs. 3869. It appears, however, Rs. 5850 was sent to Calcutta in June 1913, as the price of gold for ornaments on account of the marriage of Dhibu Noonoo (the defendant Shiva Prasad) and others. Krishna Prasad was married in August 1913, Jagananda was married in August 1915 and Shiva Prasad was not married till after Durga Prasad's death. We do not know the reasons why these two marriages were postponed, but a portion of Rs. 5850 was probably for ornaments in Krishna Prasad's marriage.

There are no entries with respect to actual worship in connection with the marriages of Pran Krishna, Kristo Prasad and Jagananda and it is contended for the plaintiffs that the *Poojahs* must have been offered by Nanda Kishore. Having regard to the fact that all the expenses were paid by the Raj and the marriages were celebrated at the Rajbati, it is difficult to see why *Poojahs* should not have been offered in these 3 marriages by the Raj, but in the

absence of any entries it cannot be held that it was offered by the Raj.

Abodh's 2nd daughter, *Chota Nooni* of Puranagarh was married in July 1904. The entries show expenses in connection with negotiations for the marriage, gold for ornament and cash payments of about Rs. 1000 for her *tilak*, price of gold and silver for ornaments for her marriage (Rs. 1347). Invitations to relations were issued. The expenses paid in connection with the *marwa pooja*, *Nandi Mukh Sradh*, worship of the family deity, articles supplied to the Raj stores, wages of labourers for roofing the *Siraghar* and *Mawwaghur* in Raj Mata's mahal (Durga Prasad's step-mother's mahal), wages for bearers for Nanda Kishore's wife's coming to the Rajbati (and going back), the fact that Netpuris received on the occasion were credited to the Raj these and other entries show that the marriage was celebrated at the Rajbati; and the total expenses amounting to about Rs. 4000 were borne by the estate. The expenses in connection with her *diragam-in* (Benarasi Sari, Jackets, utensils, trunks &c) were also borne by the estate.

In March 1905 the *upanayana* of five boys, Pran Krishna Jagananda, Bhola Prasad, Krishna Prasad and Shiva Prasad took place at the Rajbati as the entry of price of planks &c., in connection with the *upanayana* of the boys at the Rajbati indicates. Invitations were issued to relations. The expenses of the worship of the family Gods and the price of articles necessary for the ceremony, for feeding Brahman, relations and kinsmen, and the *dakhina* of the priests were all borne by the estate. The Raja gave as *bhiksha* (alms) Rs. 150 to the boys.

It appears that in March 1911 the initiation of two Ranis of Raja Durga Prasad (plaintiffs Nos. 2 and 3), Pran Krishna's wife, the sons of Kunjo Behari and the widow of Krishna Prasad by the family *guru* (Mahaprovu of Bero) took place jointly and *pronami* was paid to the *guru* in a lump. There is nothing in the fact that the initiation was by the same *guru*, because being descended from the same ancestor they would have the same *guru*. But what is relied upon is that there was *joint* initiation at the Raj expense at the Rajbati. The *pronami* was paid to the *guru* for the initiation of those persons and others. But during Raja Durga Prasad's time practically all the expenses of Nanda Kishore's and Brojo Lal's branches were paid by the Raj.

Then there are many entries showing that when the Raja was invited by other people, Nanda Kishore, Kunjo Behari and members of their branches of the family represented the Raja of

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Jheria on invitations; and took *Netpuris* (customary social presents) to different places on behalf of the Raja. These entries are from 1344 to 1915 i. e., during the time of Raja Jaimangal and Raja Durga Prasad. It appears, however, that sometimes persons who were not members of the family and perfect strangers were also sent with *Netpuris* in response to such invitations. There are also entries showing that *Netpuris* (presents) received from relations on occasions of marriage and *Sradh* of members of Nanda Kishore's family were credited to the estate. That would go to show that the presents were received by the Raja as the head of the family.

Then there are numerous entries showing that relations by marriage of Nanda Kishore and Kunjo Behari were received in the Rajbati as guests and treated as relations both during the time of Jaimangal and of Durga Prasad.

In the year 1905 Plague broke out at Jheria and Raja Durga Prasad with his Ranis and all the ladies of Nanda Kishore and Brojo Lal's branches left Jheria on the 9th October 1905 for Dheya where the estate had bungalows. After sometime the Raj officers left Jheria and there is a break in the *rokar* in the entries of the Rajbati between the 2nd and 22nd Kartick (October 1905). The entries in the *rokar*s show payment of wages of bearers of eleven palkis for carrying the ladies to Dheya, and also for the return journey. Plaintiff No. 1 does not admit that any one of Nanda Kishore's or Brojo Lal's branches went to Dheya. She says that she and others went in six palkis. But as stated above, eleven palkis were required. Rani Chatura Kumari says that every one of the ladies of the three mahals went there. While at Dheya Jaimangal's eldest daughter's *diragaman* took place, and after that, they all went on a pilgrimage to Puri except Nanda Kishore's wife who went to her father's house at Dheya. Having regard to the evidence, we think that the members of the Nanda Kishore's and Brojo Lal's branches also went to Dheya.

Then there are a number of entries relating to payments of personal expenses of or presents to other members of Nanda Kishore's family. During Jaimangal's time there are only a few relating to the eldest daughter of Nanda Kishore (Nooni of Gnati) and Nooni of Kumargarh (Abodh's eldest daughter), but during Durga Prasad's time there are a number of entries not only relating to them, but also other members of the family such as Krishna Prasad, his wife, Abodh Behari's son and daughters, and daughter's daughter etc. There are entries relating to the Narat

and *annaprasana* ceremonies of Pran Krishna's (Thakur Moni's) daughter.

With regard to Brojo Lal's branch, there are a number of entries relating to expenses of members of that branch during Jaimangal's time such as expenses for repairs of house, payment of debts of Kunjo, expenses connected with births, marriages and deaths, *Sradh*, *Rash* festival, and various other expenses. During Durga Prasad's time the entries are numerous. To mention only a few items—train fare for reserved accommodation Rs. 200, expenses for going to play football Rs. 30, fees of lady doctor for medical treatment of Kunjo's widow Rs. 1900 again Rs. 390 those of midwife Rs. 89, medicines Rs. 107 and so on.

Kumari Sanad.

The defendant produced a *Kumari Sanad* said to have been granted by Raja Durga Prasad to Nanda Kishore on the 19th October 1900. It recites that Nanda Kishore was formerly the Kumar, but that after Jaimangal became the Raja, Durga Prasad became Kumar, and as at his installation Nanda Kishore's grand-son held the umbrella, Nanda Kishore prayed for the *Kumari Sanad*, and it was, accordingly, granted to him. The defendant's witness Raj Gopal Gossain of Bero says that Krishna Prasad was entitled to hold the umbrella but as he was senior (by relationship) to Durga Prasad, Fakir Noonoo (Jagananda) held it but it was arranged that Krishna Prasad would get the *Kumari* dues. Another witness for the defendant Raja Sham Lal of Jamtara, however, says that it was Krishna Prasad who held the umbrella. Neither Krishna Prasad nor the defendant has come to the witness-box. It is said that Nanda Kishore used to realise the *Kumari Dasturi* as Durga Prasad had done before him, while Jaimangal was the Raja. The Court below has found that the *Sanad* was granted and that Nanda Kishore realised the *dasturi* from tenants and *ijaradars*.

It is pointed out by the plaintiffs that the copy book of *Sanads*, shows that *Sanad* No. 1 is dated 1st Chait, 1310 and that the next one entered in the book is dated 1st Bysack 1310; and that the copy of Nanda Kishore's *Sanad* in the copy book differs from the original; some lines occur twice in the original and once only in the copy book. It is suggested by the defendant that a *Sanad* is given a serial number as it is received from the Raja after being signed by him, and that the Mohurrir who copied the *Sanads* wrote 'Chait' by mistake for 'Bysack'; and it is pointed out, that the same page contains *Sanads* of 1st Chait 1310 and 1st Bysack 1310; so there

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can be no question of a page having been inserted in the book. The omission of a passage in the copy is said to be a mere clerical slip. But it was compared and it is unusual that the comparing clerk should have made the same mistake. However that may be, these explanations might have been accepted if they had been offered by the mohurrir Mukteswar who is alleged to have compared the Sanad. He was examined in this case, but no question was put to him on the point.

Jageswar Prasad mohurrir who wrote rokats at the Rajbati said that Durga Prasad used to get Kumari Dasturi while Jaimangal was Raja, and that Nanda Kishore did so in the time of Durga Prasad. Mukteswar Boral who was in the service of Durga Prasad says that he used to realise the Dasturi from 1300 for Durga Prasad, that it was realized at the rate of 1 and 2 rupees from every mouzah, that from 1307 Nanda Kishore got the Dasturi and that the Raj Tehsildars Jageswar and Behari Lal realized it for him. Jageswar admits that he had no papers nor does he say that he realized for Nanda Kishore, whose house he never visited, and no question was put to Behari Lal.

No *Kumari Sanad* of Durga Prasad has been produced. Mukteswar said that he had a Thoka book of collections and also counter-foils but that he did not search for them nor did any one else. The *Kumari Sanad* granted to Nanda Kishore would be with Krishna Prasad in the ordinary course, but the defendant did not adduce any evidence to show where and from whom he got it. Kirti Bakshi says that Nanda Kishore got the *Dasturi* and that the collection papers are with the persons who realized it. But he never saw realisation.

No *Kumari Sanad* of Durga Prasad has been produced. It is suggested by the defendant that Durga Prasad was the brother of Jaimangal and if there was a custom of *Kumari Dasturi*, he could realize without any *Sanad*, not so Nanda Kishore who had ceased to be Kumar during Jaimangal's time, and, therefore, a *Sanad* was necessary in his case, that Durga Prasad would not care to preserve the *Kumari Sanad* nor the collection papers and challans after he became the Raja (as the income from the *Kumari Dasturi* did not exceed Rs. 400 a year). That may be so, but the fact of collection of the *Kumari Dasturi* by Durga Prasad and Nanda Kishore might have been proved by examining the ijaradars and tenants. It is pointed out by the defendant that the *Kumari Dasturi* was referred to in the written statement, and the *Sanad* was filed with it but in the application for appointment of a Receiver the plaintiffs did not deny the *Kumari Sanad* or the realization of the *Dasturi*, so

the defendant did not think it necessary to adduce evidence on the point.

It is further stated that Behari Lal who was examined on the 4th July was not asked anything about realisation, because until Mukteswar made the statement on the 5th July that Behari Lal used to collect, the defendant was not aware of it, that it would have taken time to make enquiries on the point and Behari might have left Calcutta after giving his deposition on the 4th July. But the statement of Mukteswar was taken by the defendant's pleader 20 days before his examination though he says that he did not say anything to the pleader about Behari's realization. Behari is a tehsildar under the Raj and he might have been recalled as Mukteswar was.

It is pointed out by the defendant that Sasi Bhusan who wrote the *Sanad* died long before any dispute arose, and that neither his handwriting nor the signature of Raja Durga Prasad was challenged in cross-examination. But the Kumari Sanad itself and realization were seriously challenged in the Court below, although not denied in the application for a Receiver. The defendant adduced evidence as to the *Sanad*, and attached great importance to the document before us in argument. In the circumstances, the defendant should have adduced evidence to explain the copy of the Sanad in the book and to prove realization of Dasturi. There is no documentary evidence that *Kumari Dasturi* was ever realized either by Durga Prasad or by Nanda Kishore and we think that the realization of Dasturi has not been proved.

Worship.

In the plaint nothing was said as to worship though it was generally stated that Raja Udit was "quite separate" from Nanda Kishore and Brojo Lal. In the written statement Nilkantha Bashini was referred to as "the family goddess of the Jheria Raj family."

In the affidavit made by Bhola Prasad (son of Kunjo Behari) on behalf of the defendant in the objection to the receiver application it was stated that Nilkantha Basini is the family deity of the family. "On Bejoya Dasami day we all go in a body to bow our heads to the said goddess."

The Court below, however, in the judgment states "It is not the case of any party now that Nilkantha Basini is the family goddess of the Jheria Raj family, so the statement in Exhibit J22 to the effect that Purnanagarh is the seat of the family goddess Nilkantha Bashini is not correct. Lakhi Jonardan Jiu is admittedly the family god of the

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Jheria Raj family." The learned Subordinate Judge then refers to the evidence that Nilkantha Bashini is the family goddess of Katrás, Jheria and Nawaghar and of Palgunge from which these families sprang, that she is at present treated as a village deity, that she is worshipped by the Raj in the month of Bysack and on ceremonial occasions, and that the members of Nanda Kishore's family also worshipped her on ceremonial occasions, that on the Bejoya Dasami day the Raja, Kumar Saheb, Thakur Saheb and others all go there together and offer obeisance to her, and that under these circumstances he cannot believe that there was separation in worship.

There is no image of the deity Nilkantha Bashini; there is a tamarind tree and vermillion is put upon it, and the place is called Nilkantha Bashini *sthan* (place). The defendant contended that the statement that "it is not the case of any party now that Nilkantha Bashini is the family goddess of the Jheria Raj family," is not correct, that she is the family deity, though Lakhi Janardan is also the deity of the Raj. It is pointed out by the plaintiffs that in the written statement there was no mention of Lakhi Janardan, nor that Nanda Kishore's branch participated in the worship of Lakhi Janardan, but the defendant says that as the plaint did not state anything specifically about worship, the deity Lakhi Janardan was not mentioned in the written statement, and Nilkantha Bashini was mentioned only for locating the house at Puranagarh where Tara Kumari and Nanda Kishore lived. It is also pointed out by the defendant that in the affidavits in support of the plaintiffs' petition for appointment of a receiver it was stated that Nilkantha Bashini was a village deity and had no connection with Nanda Kishore or the Raj. We do not think that any importance should be attached to these contentions of the parties, because they had sufficient notice of the case which each had to meet long before the trial began and it cannot be said that any party has been prejudiced.

It does not appear when Lakhi Janardan (consisting of two metal images) was established but it seems to have been in the new *garh*. There was no provision made for their worship by the Court of Wards during the minority of Raja Udit.

The earliest provision for worship by the Court of Wards was made in the Robakari of Mr. Hamilton, dated the 19th January 1839 (Exhibit K) by which a total sum of Rs. 3175 "including Rs. 200 for the Dusserah Puja" was ordered to be paid to Rani Kadam Kumari, the guardian of the minor Raja Udit when the Court of Wards framed a scheme of management after Raja Udit's death. Other sums were ordered to be paid to Magan Kumari and Tara

Kumari for their maintenance. The sum of Rs. 200 for the Dusserah Puja was included in the sum of Rs. 3175 to be paid to Rani Kadam Kumari, the guardian of the minor Raja. It is said that the allowance for Dusserah Puja was given to the minor's guardian as the head of the family, and was, therefore, meant for all the branches. Probably that was so, but there is nothing to shew that the other branches joined in the Dusserah Puja.

It is contended for the defendant that Lakhi Janardan was first established by Raja Udit after attaining majority in 1847, and that probably there was daily worship. If the deity was established there must have been daily worship though it might have been on a very small scale. Reference is made to the petition of Rani Nil Kumari, dated the 27th December 1855 in which she stated that during the time of Raja Udit a building was constructed and consecrated for the *Rash mehal* of the deities. That, however, only means that a *dalan* (masonry building) was constructed and consecrated for the *Rash mahal* (where the *Rash* festivities in honour of the deity is celebrated) not that the deity was consecrated. On the other hand, it appears from the Tehsildar's report (dated 1844) in connection with repairs to the Rajbati for which application was made by Rani Kadam Kumari, that there was a *Rash ghar* (evidently a mud built house) in the Rajbati, so Lakhi Janardan appears to have been established before 1844 and not after Udit attained majority in 1847.

The plaintiffs contended that there is no evidence that Nanda Kishore joined in that worship and the probabilities are against it as he was living at Puranagarh. It is contended by the defendant that the priest would perform the worship, the Raja paying for it, and that the worship thus vicariously performed by the Raja would be for the whole family. That argument might have force in an ordinary joint family. But, in the present case, the Raja alone would pay the expenses in which the other members have no share, and in such a case an inference of joint worship can hardly be drawn unless Nanda Kishore and Brojo Lal's branches actually joined in the worship.

It is asserted on behalf of the defendant that the family is of Baghela Rajput stock, coming originally from Baghelkhand; but of this the evidence is slight and, of course, hearsay. It is his case that, following the custom of this section of the Rajput caste, the Raja celebrates the Dusserah on the Bejoya Dasami day on which occasion he goes in procession, sword in hand, to the viewing of the *nilkantha* bird (the blue jay); and it is contended that this is

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peculiar to the Rajputs. But the evidence as to the nature of the worship performed by the Raja and the other members of his family before 1850 when the scheme referred to above was framed by the Court of Wards is meagre. The Dusserah Pujah takes place once a year. It is to be observed that the Court below does not refer to the Dusserah Puja in his judgment at all.

It is further contended by the defendant that the expense for the worship of Lakhi Janardan, including (Rashjatra) and Rathjatra and the "Dusserah" were meant for the whole family. These items no doubt appear under the heading "Annual *mosakhara*" under which the maintenance allowance of Rani Tara Kumari and other members of the family are mentioned. But after mentioning all the *mosakharas*, the expenses of Lakhi Janardan, Rashjatra, Dusserah, Rathjatra, expenses for ten men for guarding the minor, for coolies, household and garden servants all appear under the same heading. Mr. Crawford in his letter, dated the 26th July 1850 sanctioning the scheme said "The several *khorposhdars* may be provided as proposed in the letter". They do not seem to have been concerned with any other item. But assuming that the religious expenses were meant for the family of Nanda Kishore also, Nanda Kishore was living at Puranagarh with his mother Rani Tara Kumari from 1837, and there is nothing to show that they participated in the worship of Lakhi Janardan or Dusserah. We have seen that Rani Tara Kumari and Rani Magan Kumari did not come back to the Rajbati notwithstanding the fact that Rani Gobinda Kumari and Kadam Kumari went to bring them back in 1837, and in 1839 Rani Tara Kumari complained to the authorities that Kadam Kumari was trying to take her life and that of her son Nanda Kishore. The junior Ranis were living at Puranagarh at a distance of a quarter of a mile, and it is extremely improbable in this state of feeling that they went to the Rajbati to join in the worship of Lakhi Janardan. It is said that plaintiffs' case was that there was separate worship only after 1847; and reference is made to paragraph 8 of the Receiver petition, but that paragraph does not state that separate worship was carried on only after the *khorposh* grant in 1847.

In paragraph 7 of the affidavit it was stated that after the *khorposh* grant in 1847 Nanda Kishore with his mother became *absolutely* severed from the Raja in food, worship and estate. The statement that upon "such *khorposh* grant being made" Nanda Kishore and his mother lived in a separate house about one-fourth mile from the residence of Raja Udit cannot be correct as the records show that

they were living separately from 1837. The statements were hearsay as mentioned in the said paragraphs.

It is true that there is no evidence of what sort of worship was carried on at Puranagarh or at the Rajbati before 1847 (the Dusserah Puja being celebrated only once a year). There is the evidence of Kartic, but he was speaking to events which took place more than 70 years ago, and no reliance can be placed upon his statements, but the probabilities are that the ladies did perform some worship. In Tara Kumari's petition, dated the 13th September 1850 (Exhibit J7) she stated that besides the *khorphosh* grant Raja Udit paid Rs. 600 in cash and clothes Rs 300 a year and in addition would separately pay for meeting the expenses of marriages and *religious festivals* etc. which go to show that some religious ceremonies were performed.

There is some evidence that Nanda Kishore used to go to bow to the deities Lakhi Janardan at the Rajbati. But that was long afterwards and by itself does not show that he was joint in worship, because many people, even outsiders, would do the same.

Some witnesses for the defendant (Jagadish Upadhyaya, Behari Lal and others) have deposed that on the occasion of the *Janmastami* festival, the Kumars, Thakurs and others by turn carry (on the day of *Nandatsav*) turmeric and curds in earthen pot on their heads and perform *kirtan*. Some witnesses describe in what order *abir* is given to the deity. It is also said that at the time of the *Janmastami* all the ladies, including those of Nanda Kishore's family, used to come and offer *Puspanjali*. Behari Lal stated that the *prasad* of the *bhog* offered to the deities (Lakhi Janardan) were distributed to each mahal including Nanda Kishore's mahal. But all this has reference to very recent times, Jagadish became the priest from 1900 and Behari from 1904 and Behari Lal says sometimes Nanda Kishore, sometimes *Shiva Prasad* defendant, sometimes Janaki Prasad and sometimes Thakur Pran Krishna carried the pot on his head. Having regard to the fact that during Raja Durga Prasad's time Nanda Kishore's and Brojolal's branches were treated as members of the Raj family, the statements referred to above are probable.

The Court below observes that "entries in the rokars are clear enough to show that not only the expenses for worship by Nanda Kishore and his family were paid out of the coffers of the Raj estate, but Lakhi Janardan Jiu the family God of Jheria Raja and Siraghar in the Rajbari were duly worshipped by the members of the family of Nanda Kishore," and refers to a large number

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of entries. The entries mentioned in the judgment refer to payment of some religious expenses to Nanda Kishore's family, but with the exception of only one Exhibit DD239 (and Chutka Exhibit 12198) which relates to payment of One Rupee to Jageswar Upadhya the priest on account of *Pranami* given by Thakurani Sahaba at Thakurbati on the occasion of Janmastami, the rest do not show that *Lakhi Janardan Jiu*, the family God of the Jheria Raja and the *Siraghar* in the Rajbari were *duly worshipped* by the members of the family of Nanda Kishore.

There is a great deal of controversy as to whether there was a Siraghar in Puranagarh. A Siraghar is a house or room within the family dwelling house which is used by the members of the family for worship. The existence of any Siraghar in Puranagarh is denied on behalf of the defendant.

It is contended for the defendant that originally the Dusserah was nothing but sword worship which the ancestors of the Jheria Rajas who were Beghela Rajputs brought with them from Rewa, that the sword must have been taken by Raja Sangram from Puranagarh to the Siraghar in the new Rajbati and that the sword worship was carried on in the Siraghar. But no question on the point was put to the plaintiff No. 1 who was examined and cross-examined for more than 100 days, nor was any witness for the plaintiff asked any question about sword worship (or about the *nilkantha* bird). Rani Chatur Kumari did not say anything about it. Neither does any witness for the defendant mention the sword or the *Nilkantha* bird. Only one witness, Jagadish Upadhaya (the priest of the Rajbati, deposed to it. He stated that Puja is offered to the swords on three days during Durga Puja and on occasions of marriages, sacred thread ceremonies etc., and that goats are sacrificed during Durga Puja. He never worshipped the swords, but Udai Chakravarti did so in his presence. Udai Chakravarti appears to have been present at the Calcutta residence of the defendant when the trial was going on in the Court below. But he was not examined. In these circumstances, we are unable to accept the story of the sword worship at the Siraghar set up after the close of the plaintiff's case. In any case there is no evidence to show that Nanda Kishore's branch joined in the sword worship.

The plaintiffs' case that Nanda Kishore built a Siraghar at Puranagarh is not proved by any evidence, but plaintiffs have examined some witnesses to show that there was a Siraghar for the worship of Nanda Kishore's family in Puranagarh. The defendant's witnesses,

on the other hand, denied the existence of any Siraghar there, his case being that no worship took place in Puranagarh at all, and that Nanda Kishore's branch joined in the worship at the Rajbati.

Of the defendant's witnesses Mukteswar, Kirti Baksi and Jagadish (the Raj priest), the Gossain of Bero, and Kalipado never went to Nanda Kishore's house, while Jageswar, Behari and Nathu Singh never entered the huts of Nanda Kishore. Their evidence, therefore, is of no value. Much reliance is placed upon the evidence of Rani Chatura Kumari (the widow of Raja Jaimangal). But she admits that the defendant has been all along supplying to her daughters and their husbands whatever they require such as money, dress, ornaments, furniture and other things "as soon as they ask for the same." She never went to Puranagarh nor to see Nilkantha Basini. She says that all religious ceremonies were performed at the Rajbati whither the ladies of Puranagarh used to come. She admits, however, that there is a custom with every Chhatri of her class to have a *Tulsi Pinda* and a Siraghar and that Tij, Jita, Durga Puja, *Sradh* etc., are performed in the Siraghar. She was asked "In performing the Puja of *Jimut-bahana* is a branch of the banyan tree planted in the courtyard and the Puja performed at its foot?" She answered "Yes, no. Both are worshipped: *Jimut-bahana* as well as the branch which is planted into the ground are worshipped". "Where in your Raj family is the branch planted?" "In the courtyard of the Siraghar." "Does any priest officiate at the said Puja or do the females themselves do every thing?" "No, the priest performs the Puja". She says that Satyanarin *katha* is recited near the *Tulsi Pinda* once a month, and lamps are lighted every evening at the Siraghar and near the *Tulsi Pinda*. Janaki Kumari (the youngest daughter of Nanda Kishore) stated that religious ceremonies of her father's family were performed at the Rajbati. She was asked, Q. "Is a separate *Tulsi Pinda* kept in each separate house among your caste people? Is that so?" A. *Tulsi Pinda* is kept, *shira* is kept. Q. Is a *shira* kept near to the place where *Tulsi Pinda* is kept in each separate house? A. It is so in my house. How can I say it is so in all the houses? Q. Have you seen any house in your life where there is *Tulsi Pinda* but not a Siraghar? A. Why should I see as that?

Tikait Birendra Narain of Doranda (elder brother of Rani Chatura Kumari's daughter's husband) says that every house holder has *Tulsi Pinda* and Siraghar, and the latter is situated near the former. Gopal Acharji Gossami, Mahaprovu of Bero, the *guru* of

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the Jheria Rajas says that the tutelary deity of the Raj is Lakhi Janardan but the family deity is Nilkantha Bashini, that she is the family deity of the Katras Raj though that Raj has another tutelary deity Damodar Chandra. He says that Nanda Kishore had no separate *Debsheba*, and stated the reasons why he inferred that such was the case :

(I) Nanda Kishore is our disciple : if he had had a separate *Debsheba* there would have been festivals etc. of that deity and we should have come to know (of the same).

(II) If he had a separate *Debsheba* he would not have come to the temple of Lakhi Janardan.

(III) At the time he had been in the Rajbati his house at Puranagarh was according to what I have heard not a fit state for an image of a god to live in.

(IV) If there had been a *Debsheba* there would have been Brahmans engaged for Puja etc. and other men engaged for helping.

But he paid his first visit after Raja Jaimangal's death i.e. during Raja Durga Prasad's time when it is very likely that Nanda Kishore's family would go to the temple of Lakhi Janardan. He admits he never went to Puranagarh (except once) though Nanda Kishore was his family disciple. Nanda Kishore was in indigent circumstances and that explains why no religious festivities were celebrated and why the Mahapravu was never called. Nanda Kishore lived in huts, but the Siraghar is a hut, and the bastu deity is located in some stones or trees. There was no deity like Lakhi Janardan established which would require Brahmans to be engaged for worship.

As a matter of fact, the Mahapravu had never been inside the huts of Nanda Kishore. He admits that his debts to the extent of one lac and forty-nine thousand was paid by the defendant when he got the *Gadi*, by way of *Guru Dakkhina* (present to him as a spiritual guide). In all these circumstances, we do not attach importance to his statements.

Admittedly there is a *Tulsi Pinda* at Puranagarh and the question is whether there was a Siraghar, and Nanda Kishore's family worshipped there.

Plaintiffs' case was that Nanda Kishore had 4 houses at Puranagarh. In one of them, a north facing house, a portion is said to have been used as a Siraghar and the other portion was occupied by Lal Behari. Janaki Kumari when cross-examined as to whether the house was divided into two portions avoided the ques-

tion and then said that she did not recollect. She denied the existence of this north facing house altogether and said that Nanda Kishore had only three houses. But apart from the witnesses for the plaintiffs, the defendant's witness Nathu Singh said that there were 4 houses. On behalf of the defendant it was contended that the two statements were not inconsistent because Nathu Singh was speaking of the time in 1879 when Lal Behari and Abodh Behari were married, while Janki Kumari was speaking necessarily of a much later period (she was born about 1880); and that it is quite possible that at the time of which she was speaking, the north facing house had fallen down, as even according to the plaintiffs' witnesses one of the *ghars* was in a dilapidated condition and a portion had fallen down. But the defendant's witnesses though stating that Nanda Kishore had only 3 huts, did not deny the existence of the north facing hut. Behari Chackerbutty who entered the service of the Raj so late as 1904, says, he went to Nanda Kishore's house 8 or 9 years before his death, which would be about 1907, and he saw the southern hut (i. e. the north facing hut), Behari Lal Singh another witness for the defendant and building Sircar of the Raj since 1907, says that there was a broken hut on the southern side which had its door on the northern side. Again Mukteswar, another witness for the defendant, says that Nanda Kishore had a hut facing north. The very fact that Janki Kumari attempted to ignore the fourth *ghar* (the north facing one a portion of which is said to have been the Siraghar), and wanted to avoid the question leads to the suspicion that she was not speaking the truth as regards the Siraghar. For the first few days of her examination and cross-examination she referred to her father's *garh* as Puranagarh, and the Rajbati as the new *garh*, but subsequently said that "Raja's *garh* and the Puranagarh are the same indeed" and went on repeating the same thing. The defendant it appears has married the daughter of her husband's sister, and having regard to what has been stated above, her evidence cannot be accepted. It is pointed out on behalf of the defendant that in the petitions of Rani Tara Kumari for repairs no reference was made to any Siraghar. But four houses were mentioned, and as the Siraghar was located in a room in one of them, it would be unnecessary to mention the Siraghar specifically. Reference is made to paragraph 11 of the affidavit of Rajendra De formerly Surveyor of the Jheria Raj. He demolished the old house of Nanda Kishore for erecting a Rajbati for Shiva Prasad at his instance. In the plan prepared by him (in 1916) the *Tulsimanicha* and Siraghar are shown, and the

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latter is shown as separate from the southern hut. It is suggested on behalf of the plaintiffs that he might have made a mistake, as the demolition took place some years before. That is somewhat unlikely as he himself demolished the huts, but it is not impossible, and he might have made the note from what he had heard from others.

It is to be observed that Puranagarh was the old residence of the Jheria Rajas until Raja Sangram built the present Rajbati. Admittedly there is a *Tulshi Pinda* there. There must have been a Siraghar there before Raja Sangram left; what became of it? It is suggested by the defendant that it might have been allowed to fall down, after Raja Sangram took the swords which are ordinarily kept in the Siragarh to the new Rajbati. But there is no evidence of that. There were certain ladies, Raja Pirthi Singh's widow and others, residing at Puranagarh. Ranis Tara Kumari and Magan Kumari went to reside there in 1837 and in spite of repeated requests of Rani Kadam Kumari they would not go to the Rajbati. We have mentioned the ill-feeling then existing between the ladies. It is extremely improbable that in these circumstances Ranis Tara Kumari and Magan Kumari and Raja Pirthi Singh's widow and the other ladies residing at Puranagarh went to the Rajbati to perform worship. As orthodox Hindu ladies they must have had some place within their dwelling place where they could perform worship such as *Jita* and *Tij*, say their daily prayers and bow to the gods. It is in the highest degree improbable that they would go a quarter of a mile to the Rajbati for such purposes.

We have already referred to the petition of Tara Kumari, dated the 13th September 1850 (Exhibit J7) where she stated that Raja Udit used to give the expenses of marriages, *parabs* (religious festivals) and *parbani* (presents). Janaki Kumari (3rd widow of Nanda Kishore) in paragraph 8 of her affidavit (in the Receiver application) stated that on occasions of Pujahs and festivals they used to get all their expenses from the Raj.

The plaintiffs reply on Exhibit EE 1031, an entry in the rokar, dated 31st January 1905 which runs as follows:—"7 cubits of *nayansuk* cloth for *dala* Pujah at Puranaghar on the occasion of *Jitastami* festival," as showing that the *Jita* was performed at Puranagharh. The entry is a portion of a larger entry of payment to one Balahari Kar for various articles, the first being the item noted above. Below that there are various items such as—

Markin cloth 9 cubits	...	...	0	11	5	•
Bleached <i>saris</i> 3 pairs	...	...	8	4	0	

Small <i>sari</i>	...	...	...	0	14	0
Tikait Saheb's <i>dhuti</i>	...	...	...	9	0	0
Raja Bahadur's <i>dhuti</i>	...	...	...	2	4	0

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and then the clothes purchased for the Maharani, Ranis and other persons. [They are printed in portions at pages 71 to 74 of paper-book vol. M(i)]. It is contended that if the first item is for *Jitastami* at Puranagarh, those which follow would also be for the same purpose, because there is no other heading, and it is also suggested that the heading might be wrong. But the entry related to the payment for clothes purchased from Balahari Kar, the other items below the first might be for *Jitastami* (at the Rajbati) or for clothes supplied on some other occasion. However that may be, in the absence of any evidence on the point the first item certainly shows that cloth was purchased for *Jitastami* at Puranagarh. There is an entry, dated 22nd September 1894 (Exh. C341) of payment of Rs. 4 for expenses of *Jita Parab* to Nanda Kishore. The defendant says it was paid on the occasion of and not paid to Nanda Kishore, but the vernacular word is *Kumarke* which certainly means paid to the Kumar. This was during the time of Raja Jaimangal.

On the 16th August 1900 a sum of Rs. 4 was paid to Nanda Kishore for expenses for *Janmastami* Puja, and Rs. 3 to his wife. It is contended by the defendant that Nanda Kishore and his wife would not have separately been holding the *Janmastami*. But the *Janmastami* might be celebrated both at the Rajbati and also by Nanda Kishore and his wife at Puranagarh. There is fasting and there are some expenses connected with it such as feeding of Brahmans etc. There is, therefore, nothing strange in Nanda Kishore and his wife observing *Janmastami*, or the ladies performing the *Jita*, *Tij* etc. at Puranagarh.

Reference is made by the defendant to the *garah* book from which it appears that Rs. 15-14 was spent on account of the *Janmastami* festival in the Rajbati, and Rs. 4 as the expenses of Nanda Kishore on that occasion; and it is contended that the four rupees was part of his expenses at the Rajbati. A good deal of argument has been addressed to us with reference to this *garah* book, which was started by Raja Rash Behari after having attained majority in 1867. The book consists of loose sheets of paper and contains entries mostly relating to festivals and worship—lists of *pranamis* offered to the family and village deities, the cloths purchased for the Raja's family, as well as for Nanda Kishore's and Brojo Lal's on festive occasions such as *Tij*, *Karma*, *Janmastami*, *Jita* and also for the deities. The Court below found that there was a *garah* book started in 1867, but that the book produced by the defendant was

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not that book and the learned Subordinate Judge rejected it as not having been produced in proper time.

The defendant adduced evidence to show that clothes were purchased and *pronamis* were offered according to the list in the *garah* book and that it was signed by the Raja. It is pointed out that plaintiff's witness Hardyal admitted that the deities to whom *pronamis* were offered were exactly those entered in the list in the book; that it was sometimes taken to the Raja, and that there was a book similar to the one produced Srihari, Gostha Behari and Ramdoyal on behalf of the defendant stated that the Raja offered *pronamis* to the Gods and goddesses according to the *garah*. That being so, it is argued there is no reason why the defendant should fabricate another book, and if the book is genuine, it should not be rejected by the Court simply because it was not produced in proper time. Reference is made to the case of *Imambandi v. Mutsaddi* (1). Order XIII, rule 1 of the Civil Procedure Code requires the parties or their pleaders to produce at the first hearing of the suit all the documentary evidence of every description in their possession or power on which they intend to rely. In the case referred to the Judicial Committee observed, "it does not exclude the discretion of the Court to receive any such documentary evidence at any subsequent stage". But in that case the books had been *filed previously in another Court*, and when produced they were in fact received and ordered to be placed with the record and there was no objection to their reception on the ground of non-compliance with the provisions of the Code.

In the present case the genuineness of the *garah* book was challenged, and the Court below has rejected it not only on the ground of delay in production, but also because it was not satisfied as to the identity of the book produced. The reasons given by it are stated in its judgment and we are not disposed to differ. The Court below has a discretion in the matter. The order for filing documents was passed on the 20th August 1919 and the *garah* book was not produced in Court until 9th March 1921, though, even according to the defendant's witnesses, it was obtained by the pleaders Shib Das Banerjee, Gour Krishna Mazumdar and Kali Pada Roy a few months after the date fixed for filing documents. Shib Das Banerjee was examined but no question was put to him on the point. The document is a very important one and the Court below was not satisfied with the explanation given by the defendant's counsel. The appellate Court should not interfere with the discretion of the Court below unless it has

(1) (1918) L. R. 45 I. A. 73 (80-81); I. L. R. 45 Calc. 878; 28 C. L. J. 409.

been capriciously exercised. See *Biswanath v. Kalicharan* (1). We do not think that the discretion has been capriciously exercised by the Court below in this case.

But although the *garah* book was rejected, it appears, as pointed out by the Court below, from the evidence of plaintiffs' witness No. 1 Hardy Singh (Raja Rash Behari's wife's sister's son) who came to the Jheria Rajbati during the time of Raja Rash Behari, that on occasions of periodical religious festivals provision was made for cloths not only for the Raja and his family but also for Nanda Kishore and the members of his family and such distribution of cloths continued during the time of Raja Jaimangal and Durga Prasad. It is probable that Nanda Kishore's branch being dependent on the Raj for maintenance and getting clothes on occasions of religious festivals would join in the festivities at the Rajbati. But there is no definite or satisfactory evidence of this before the time of Durga Prasad.

Reference is also made to entries of wages paid to bearers for bringing the ladies of Puranagarh on the occasion of the *Karma* festival showing that they used to come to the Rajbati on festive occasions. But that does not show that no ceremonies were observed at Puranagarh, because they might have been observed on a small scale at Puranagarh and the ladies might visit the Rajbati, where there were dancing and singing on such occasions (See Exhibits 1526 and 1527).

During the time of Raja Durga Prasad there are entries showing cost of clothes purchased for the Ranis and members of the Raj family as well as for Nanda Kishore's family. But during Durga Prasad's time practically all expenses of Nanda Kishore's family were paid by the Raj and they were treated as members of the family. We need not, therefore, go into details of his time.

There is an entry, dated the 21st September 1905 of payment of "Rs. 2 to Kumar Saheb as the price of milk for *Jita Parba* through self". On the 27th September 1905 "paid to Bara Kumar for feeding Brahmans in connection with *Tarpan* Rs. 2-8". On the 21st March 1906 "paid to Kumar Saheb on account of cost of performing *homa* through self Rs. 5".

The ceremonies could not have been performed at the Rajbati because if they were, the payments would not be made to Nanda Kishore.

It is said on behalf of the defendant that *Tij* and *Jita* are merely Bratas (vows) and their observance therefore does not bear upon the question of jointness of worship and the defendant refer-

(1) (1916) 27 C. L. J. 119 (120-122).

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red to them only to show that these even were performed jointly. But we do not think that they can be so lightly passed over. *Tij* /*ita* and *janmastami* and a few such others are the religious ceremonies which are observed by ladies, and it is only in such ceremonies that they personally take any part. We do not see why they should be considered as of little or no importance upon the question of worship.

Then there are some other entries showing payment made in connection with religious festivals to Nanda Kishore and his family.

In 1895 a sum of Rs. 15 and again another sum of Rs. 85 were paid to him and similar payments of Rs. 95 and Rs. 5 were made to Kunjo Behari for the *Rash* festival (See Exhibits C 518, C 520, C 530, C 531), so that a sum of Rs. 100 in cash was paid to Nanda Kishore and Kunjo respectively in connection with this festival. They were paid as *magan*. But so far as the present question is concerned, the fact that it was paid as *magan* is immaterial because the point is whether worship was carried on in Puranagarh.

It is contended for the plaintiffs that if they joined in the *Rash* festival at the Rajbati there would be no occasion for the payment of Rs. 100 to each of them, and that such payments would indicate that the *Rash* festival was celebrated at their houses. But there is no evidence that there was any deity (Radha or Krishna) in Puranagarh for whom the *Rash* festival could be celebrated. The defendant's contention is that the payments were by way of presents on this festive occasion, and reference is made to Exhibit 201 which shows that *Parbi* was given to the Raj Mata, the Ranis and other members of the Raja's own family (Rs. 241 in all). The next entry (Exhibit 202) shows that Rs. 5 was paid as *Parbani* to Nanda Kishore on the occasion of *Rash* festival. There could be no question of the Raj Mata and the Ranis etc. celebrating the *Rash* festival separately, and the payment of *Parbani* means "present on festive occasions" in the case of Nanda Kishore also. Rani Chatura Kumari said that *Parbani* to Kunjo meant his pocket expenses such as *bakshis* (present) to the servants and *Bhikaris* etc. and the plaintiff No. 1 also admits that *Parbani* used to be paid to the Ranis on some festive occasions for paying servants, sepoy and the maid-servants of the inner apartments.

There are entries in the *rokars* which show that Kunjo was in charge of the *Rashmancha* (See C. 719, C 725, C 735, C 907, C 912, C 918, C 925). He was living within the Raja's *garh* though in a separate house and it is contended by the defendant that it is not at all likely that he should have celebrated the *Rash* festival separately, and if the payment to him was by way of a present on a

festive occasion the same must be held in the case of Nanda Kishore also. We think this contention has some force.

The plaintiffs' case is that Pipra Hari was the Bastu deity (presiding deity of the dwelling house) of Nanda Kishore at Puranagarh. There was no image, but it consisted of three trees and one stone on which vermilion was applied. The Commissioner in the present case says that the site of Pipra Hari is within the compound of Puranagarh. Plaintiffs' witness Srihari says that Nanda Kishore himself offered *puja* to it, and there is no evidence to contradict it. It was not included in the list of village deities to whom offerings were made during the last illness of Raja Durga Prasad for his recovery. Had it been a village deity it must have been included in the list, as the Raja paid for offerings to all the gods and goddesses of the village for his recovery, showing that the Raj had no concern with Pipra Hari. The defendant's witness Jar ki Kumari (the daughter of Nanda Kishore) was asked whether Pipra Hari was the Bastu deity. She replied "Did I enquire if it is a ghost or what else. How do I know", and then she said she did not know if there was any place of Pipra Hari in Puranagarh.

Raja Durga Prasad died on the 7th March 1916, and the defendant Shiva Prasad on the 23rd March 1916 offered *puja* to it. Exhibit 1737 is an entry of payment of one rupee and one anna of *Naibedya* (offerings) for the worship of Pipra Hari, and as the price of one bottle of spirits. On the 24th January 1918 (Exhibit 1241) there is an entry of payment of "offering and sheep for the *puja* of Pipra Hari for 29th Poush last Rs. 3-12-0." On the 15th January 1919 again there is an entry (Exhibit 1257) "*Naibedya* for Pipra Hari Re. 1-4"

It was suggested in the cross-examination of plaintiffs' witness Kali Prasad Singh that Pipra Hari was an *Apadevata* (evil spirit or deity of a lower order). Reference is made to Exhibit DD 424 (not printed), dated 11th Magh 1909 during Raja Durga Prasad's time showing that Re. 1-4 annas was paid for *Bhut puja* (worship of ghost or evil spirit) and spirits were offered, and that this *Bhut* must have been Pipra Hari. But there is nothing to connect the two. Pipra Hari is not a deity mentioned in the *shastras*, and the plaintiffs' witness Kali Prasad Singh said so in cross-examination, but he added that "it is included according to the domestic doctrine". In the face of Exhibit 1317 showing that as soon as he got the *Gadi*, the defendant himself offered *puja* to Pipra Hari, and having regard to the uncontradicted statement of Srihari we think that Pipra Hari was the Bastu deity of Nanda Kishore and we are unable to accept the suggestion that the defendant might

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have started the *puja* of Pipra Hari after he got the *Gadi*. It is contended that there is nothing to show that Nanda Kishore established or consecrated it. But there was no image, and it probably existed at Puranagarh from before Nanda Kishore's time.

The defendant complains that Pipra Hari was first mentioned in the affidavits of Gostha Behari, Sridhar and Chakradhar in connection with the Receiver application, and though its existence was asserted no one stated that Nanda Kishore worshipped it, and it was only Srihari who spoke about its worship in his evidence, the others Gostha Behari and Chakradhar not being examined. We do not see, however, the force of this complaint. The worship of Pipra Hari by Nanda Kishore was spoken to by plaintiffs' witness before the defendant began to adduce evidence and the defendant's rokar book shows that defendant himself offered *puja* to it.

It appears that the defendant after he got the *Gadi* proposed to build a Rajbati on the site of Puranagarh and as the Jheria Water Works Board had selected some land there, the defendant in his letter, dated the 30th September (Exhibit 83) wrote as follows :—"This matter of building exactly on that spot is one of duty with me as my direct ancestors have lived there for generations past it was my birth place and the home of my boyhood and my family gods are there. The reservoir will most unpleasantly overlook the house I propose buildings."

In his petition to the Commissioner of Chota Nagpur dated the 19th October, 1916, in connection with the proposed acquisition for the purpose of the Jheria Water Works, the defendant urged various grounds against the acquisition for consideration, among others, that it was the site of his ancestral *Bastu* or homestead land and was still known as the Puranagarh, that "the seat of the family goddess Nilkantha Bashini is in the old *garh*, and it has to be worshipped daily by the priest, and the members both male and female of your petitioner's family have to go there on occasions of periodical *pujaks*," that the acquisition of the said plot will "not only put your petitioner into serious inconvenience but will wound the feelings of all the members of your petitioners's family and will put a stop to the performance of the daily *puja* of the family." The plaintiffs contend that it referred to Pipra Hari not to Nilkantha Bashini as the place of that deity was 300 yards distant from the site of the proposed reservoir and the construction of the Water Works could not put a stop to the performance of the daily *puja* of the family.

It may be pointed out, however, that Pipra Hari was not worshipped by any priest, but the worship by the priest is referred to in connection with Nilkantha Bashini in the 2nd letter to the Com-

missioner and not in the first letter (or petition) to the Jheria Water Board.

The first petition stated that the "family Gods" were there, the second drafted by Lalit Kishore referred to Nilkantha Bashini alone. There is no evidence who drafted the said letter. Lalit Kishore was examined but no question was put to him about the first letter. He, however, did not draft the first letter and it was for defendant to have the letter explained. It is, accordingly, contended by the plaintiffs that the defendant should have come to the witness box to explain the expression "family Gods" (in the plural) in his first letter to the Chairman, Jheria Water Works.

The plaintiffs' counsel strongly commented upon the absence of the defendant and a number of persons who could have spoken to the family worship from the witness box such as Pran Krishna, Krishna Prasad, Jagananda and Bhola Prasad who belonged to Nanda Kishore's and Brojo Lal's branches.

It is suggested on behalf of the defendant that the defendant was not examined, because he could say very little from his personal knowledge as he left Puranagarh when he was very young to live in the Rajbati, that being a party to the litigation his evidence would not be accepted, and that having regard to the insulting questions put to his witness Charu Chandra Chatterji, a pleader, the defendant took the risk of not going to the witness box. It appears, however, that in his affidavit (paragraphs 15 to 18) in the Receiver application, the defendant stated that since the dawn of his intelligence he (Shiva Prasad), Nanda Kishore, Janaki, Kunjo, Pran Krishna and brothers—all of them had been living in the same family and establishment with Rajas Jaimangal and Durga Prasad, that he never saw any separate worship or Thakurbari, that there was no Siraghar at Puranagarh, and he saw no Siraghar there, that the place of the deity Nilkantha Bashini, the family deity of the Jheria Raj family was within the boundary of Puranagarh, and it was the deity which was mentioned as the family god in the letter which he wrote to the Chairman of the Water Board on the 30th September 1896 and that there was no other deity in the old *garh*, that neither Nanda Kishore nor any of his descendants either had or has any *Debsheba* and *pujas* etc. which are separate and different from the *pujahs* of the Raja of Jheria. All this, he said was *true to his knowledge*, so he was competent to speak on the question of worship, explain his letter to the Chairman, and the *puja* he offered to Pipra Hari in Puranagarh on the 22nd March 1916, and also subsequently the expenses of which appeared in his rokars. We think he should have come into the witness-box. As for the insulting ques-

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tions to his witness Charu Chandra Chatterji, he no doubt was asked whether he visited some houses of ill-fame with the Raja of Nowagarh, but that witness was examined towards the close of the defendant's case. It does not appear that any insulting questions were put to any other witness and the defendant could not have anticipated the questions of which he complains.

Bhola Prasad's affidavit in the Receiver application was also on the same lines and his statements also were alleged to be true to his knowledge, so he too could have spoken to joint worship and he was not examined. As for Krishna Prasad, Pran Krishna and Jagannanda, it is stated on behalf of the defendant that each of them was married to a relation of the Ranis, and, however friendly they might be to the defendant, they would also be friendly to the Ranis, and all these persons could only speak of the later period for which there was documentary evidence, and that the defendant instead of calling them, relied upon documentary evidence alone. As for Pran Krishna, he brought a suit for recovery of the Raj estate. We need not go into the details of that suit, but we think the defendant may have had some justification for not calling him. We are of opinion, however, that the other persons referred to above, as also Nanda Kishore's 3rd wife Janki, for whose examination a commission had been taken out, and Abodh Behari's widow could and should have been examined as they were competent witnesses on the question of worship. Rani Chatura Kumari never went to Puranagarh so she could not speak to what took place there, and the only witness of Nanda Kishore's family examined in the case was Janaki Kumari (his youngest daughter). But her evidence is biassed and not at all satisfactory. Assuming that the family *gods* mentioned in defendant's letter to the Jheria Water Board referred to Nilkantha Bashini as alleged in his petition to the Commissioner, dated the 19th October 1916 the petition stated that she has to be worshipped daily by the priest, and the "members of the family both male and female of your petitioner's family have to go there on occasions of periodical *pujas*." But members of whose family both male and female? So far as the members of the Raj family was concerned, it is not shown that the Raja went on occasions of periodical *pujas* except that on the Bejoya Dasami day he went to bow to the deity and paid *pranam* to it and gave a gratuity to the doorkeeper. Rani Chatura Kumari admits she never went there. She says that Rani Golap Kumari used to go, but there is nothing to corroborate her statements. There is very little doubt, therefore, that the statement refers to Nanda Kishore's family and not to the Raj family, and this is strong evidence to show that Nilkantha

Bashini was worshipped by Nanda Kishore's family, and the Raj offered *puja* or *pranamis* only occasionally.

In the petition of Rani Nil Kumari (widow of Raja Udit and mother of Rash Behari) dated the 27th December 1855 (Exhibit 5) for repairs of the building of the Thakurbati, she stated that sin was being committed owing to the inconvenience to which the family deity was subjected by reason of the building not being completed, the deity is not named in the body of the document but the seal bears the name "Lakhi Janardan Jiu- Rani Nil Kumari of Jheria." After the death of Rash Behari, the Court of Wards in taking over the charge of the estate stated that "there are two Debs (deities) in the minor's residence for whose *Sheda* ten annas a day are required," and also mentioned the expenses of worship of other deities. This is relied on as showing that there was no separation in worship. But these provisions were made for worship at the Rajbati, and unless it is shown that Nanda Kishore joined in such worship, it cannot be called joint worship. In the statement of annual expenditure of the estate by the Court of Wards during the minority of Rash Behari the expenses of the worship of Lakhi Janardan Jiu were provided for.

The two Debs referred to in the letter of the Court of Wards, dated the 14th September 1888 were Lakhi Janardan, and they are the family deities of Raj. It will be seen that Nilkantha Bashini is not mentioned in any papers of the Court of Wards. The deity is now treated as a village deity, and the Jheria Raj offers *puja* in the month of Bysack and *pranamis* are offered to the deity occasionally, the amount being larger than that offered to the village deities.

It is said that the daily worship of Nilkantha Bashini is performed by certain Mahatas as priests, and that some lands were assigned for her worship in ancient times. There is no evidence, however, as to who appropriated these lands. However that may be, and leaving aside Pipra Hari, according to the defendant's letter to the Commissioner (Exhibit J22) Nilkantha Bashini was the family deity of Nanda Kishore. The defendant's contention is that it is the family deity of the Raj also, though another family deity (Lakhi Janardan) was established at the new Rajbati. Nilkantha Bashini as already stated has no image and the trees and stone which represent the deity were not established or consecrated by any one, at any rate, not by Nanda Kishore. Now if it was Nanda Kishore's family deity, it must have existed from the time of Raja Sangram or even from that of Raja Mohan Singh, the founder of the Raj at Jheria. If so, it must have been the family deity of Raja Udit also, who was the elder brother of Nanda Kishore. As, however, no regular worship

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of that deity was performed by the Raj, the Raj having established another deity Lakhi Janardan, it worshipped Nilkantha Bashini only occasionally while Lakhi Janardan was worshipped regularly at the Rajbati and the periodical festivals such as *Rashjatra*, Janmastami (including *Nandatsoo*) and *Rathjatra* in their honour were celebrated with pomp. Nanda Kishore, on the other hand, was residing at Puranagarh and Nilkantha Bashini being close to his house he would naturally worship that deity.

The plaintiffs pointed out only a few entries relating to *pujas* offered by the Raj to Nilkantha Bashini during Jaimangal's and Durga Prasad's time. But there are at least five entries relating to her worship during the time of Raja Jaimangal and a large number during the time of the latter and there can be no doubt that the Raj offered *puja* to Nilkantha Bashini though only occasionally.

There was a *Durga Puja* started in Raja Rash Behari's time (1866-1888). It originally belonged to one Manik Mukerji and the *sankalpa* used to be made in his name, subsequently it used to be done in the name of the Raja. But *Durga* was not the family deity of the Raj, and need not be noticed further.

The plaintiffs adduced evidence to show that there was a *Salgram* in a part of the Siraghar at Puranagarh which was worshipped. It was not set up in the plaint and was set up for the first time in the affidavit in reply in the Receiver matter. Kartic Chatterji and Srihari speak to its worship. But the evidence adduced is neither satisfactory nor reliable.

The learned Subordinate Judge has not fully dealt with the evidence in connection with the question of joint worship and there are certain errors in his findings on the points. (i) He assumed that it was not the case of any party now that Nilkantha Bashini is the goddess of the Jheria Raj family or that the statement in Exhibit J 22 (petition of the defendant to the Commissioner, dated the 19th October 1916) that Puranagarh is the seat of the family goddess Nilkantha Bashini therefore was not correct; (ii) on this erroneous assumption he did not attach any importance to the important admissions of the defendant in Exhibit J 22 and he ignored Exhibit 83 (the letter to the Jheria Board); (iii) he referred to a large number of entries as showing that Lakhi Janardan and the Siraghar were *duly worshipped* by Nanda Kishore's family whereas they do not show it; (iv) he has not considered the entries showing that some religious ceremonies were performed by Nanda Kishore's family at Puranagarh; (v) he does not consider the evidence on defendant's side which corroborates the plaintiffs' case as to the existence of a Siraghar in Puranagarh.

The conclusion we arrive at upon the question of worship may be summed up as follows :—

(I) There is nothing to show that before Raja Udit attained majority there was joint worship with Nanda Kishore's branch or that any expenses in connection with religious ceremonies were paid by the Raj to Nanda Kishore's family. After the Raja attained majority he used to pay in addition to the *khorphosh* grant and cash, expenses on occasions of death and religious festivals to Nanda Kishore's family.

(II). After Raja Udit's death, during the period of Raja Rash Behari and Raja Jaimangal cloths for the members of Nanda Kishore's family were purchased along with those of the members of the Raj family on occasions of religious festivals and distributed to the members of Nanda Kishore's family.

(III). During Raja Jaimangal's and Durga Prasad's time expenses in connection with religious ceremonies were paid to members of Nanda Kishore's family. During the time of the latter the males as well as ladies of his family also joined in the religious ceremonies and festivities at the Rajbati on occasions of *Janmastami* etc. (festivals in connection with Lakhi Janardan).

(IV). Certain religious ceremonies such as *Jita Janmastami Karma* and *Tij* were performed by Nanda Kishore and the members of his family at Puranagarh, the expenses thereof being paid by the Raj.

(V). There were *Tulshi Pinda* and Siraghar at Puranagarh for the worship of Nanda Kishore's family but the existence of *Salgram* or other deities at Puranagarh is not proved.

(VI). Pipra Hari was the *Bastu* deity of Nanda Kishore at Puranagarh which was worshipped by him, and in this worship the Raj did not join. Bansbuda was the *Bastu* deity of the Raj.

(VII). Nilkantha Bashini was originally the deity of the family from which the Jheria Rajas sprang and had become in course of time a village deity. It was worshipped by both males and females of Nanda Kishore's family. The Jheria Rajas offered *pujas* in one month of the year, and on ceremonial occasions, such as marriage, births, illness etc. Once a year, on the Bejoya Dasami day, the Raja goes in procession to bow to the deity and offer *pranam* to it.

(VIII). Lakhi Janardan was the deity of the Jheria Raj whose daily and occasional worship such as *Rash*, *Dol*, *Rath* etc. were regularly carried on. There is no evidence that Nanda Kishore's

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family joined in the worship before Raja Durga Prasad's time though it is probable that being dependant members and getting clothes on occasions of religious festivals they would join in the festivities at the Rajbati. But there is, however, no definite or satisfactory evidence of this. During Raja Durga Prasad's time Nanda Kishore's family joined in the ceremonies and festivities.

(IX). *Upanayana*, marriages and births, of some of the members of Nanda Kishore's family were celebrated at the Rajbati and as a necessary consequence the religious portions of the ceremonies (including the *Nandimukh Sradh*) were performed at the Rajbati during the time of Raja Durga Prasad, only once during Rash Behari's time, and once during Raja Jaimangal's time, and on such occasions during Durga Prasad's time offerings were made to Lakhi Janardan, Nilkantha Bashini, Kutharighar and Siraghar by the Raj. There are, however, no entries to show that *pujahs* were offered by the Raj in the marriages of Pran Krishna, Krishna Prasad and Jagananda.

(X). The *Sradh* of Churaman (involving religious ceremonies) was performed by the Raj during Raja Udit's time and that of Brojo Lal during the time of Rash Behari—the Raj bearing the expenses. During Raja Durga Prasad's time some *Sradhs* were performed at the Rajbati and if performed at Puranagarh it was done at the expense of the Raj.

(XI). So far as Brojo Lal's branch is concerned, he was joint in mess with the Raj till 1857, and must have been joint in worship. Kunjo also was for sometime, at any rate, joint in mess during Rash Behari's time. His residence was within the Raja's *garh* though separated by a wall, he was in charge of the *Rashmancha*, and he must have joined the Raj in the worship of Lakhi Janardan all along down to the time of Raja Durga Prasad.

• Separation.

Considerable reliance is placed by the défendant upon the treatment of Janaki Prasad and the other members of Nanda Kishore's family by Raja Durga Prasad, as showing that such treatment was wholly inconsistent with Nanda Kishore being a separated member. On the other hand, it is contended by the plaintiffs that if there was an earlier separation during the time of Raja Udit the generous treatment of Nanda Kishore's branch by Raja Durga Prasad or even by Raja Jaimangal cannot affect the position, as there could not be any reunion. It is pointed out that Raja Durga Prasad believed that there was the custom of female

exclusion, he despaired of having a son, he was very generous to all his relations and even to strangers, he liked Janaki Prasad and thought he would be his heir, and that this explains his generous treatment of Nanda Kishore's branch. It could not, however, affect the previous separation if it had taken place more than half a century before Durga Prasad became Raja. No doubt if there was a *complete* separation during the time of the Raja Udit, any subsequent treatment by his successors cannot make Nanda Kishore's branch members of a joint family, and there is some force in the explanation of the treatment by Raja Durga Prasad suggested by the plaintiffs referred to above. But such treatment might also be due to a consciousness on the part of the Rajas and particularly of Raja Durga Prasad of Nanda Kishore's branch being joint, and unless there was *complete* separation during the time of Raja Udit, the subsequent conduct of the successive Rajas and Nanda Kishore would be evidence on the question of jointness, and the whole evidence should be taken into consideration.

No inference of intention to separate can be drawn from the fact that a separate cash allowance was fixed for Tara Kumari and Nanda Kishore by the Court of Wards as a cash allowance was also fixed in the case of the minor Raja himself for maintenance, and it is to be noted that Rani Tara Kumari agreed to take the allowance through Rani Kadam Kumari and not direct from the Court of Wards. The separate residence commenced from 1836 when Tara Kumari came away from the Rajbati but Nanda Kishore was then an infant of two and a half years and no intention to separate can, of course, be attributed to him. It is contended, however, that after he attained majority he did not repudiate the acts of his mother, but acted upon them. He asked for a *khorposh* grant of mouzahs, and two and a half mouzahs were granted. But the grant was not asked for nor made *with a view to separate* (he was already living separately at Puranagarh) and no inference can be drawn from the *khorposh* grant, in favour of a case of separation, as a similar grant was made to Brojo Lal who admittedly lived in commensality with Raja Udit so long as the latter was alive, and even after his death with his widow until 1857. There was no ill-feeling between Raja Udit after he attained majority and Nanda Kishore or his family. It is to be observed that even at the time of the *khorposh* grant made by Raja Udit in 1847 Nanda Kishore was only about 14.

Confining our attention to the period of Raja Udit alone, the following facts may be taken to be established. (a) Separate residence of Tara Kumari and Maḡan Kumari at Puranagarh not-

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withstanding the repeated requests of Rani Kadam Kumari to live in the Rajbati, but Puranagarh belonged to the Raj, and the expenses of repairs were paid by the Raj, (b) Separate messing, (c) Clothes once given by the Court of Wards to members of Nanda Kishore's branch along with other members of the family including the minor Raja, (d) Maintenance (including the cost of clothes) paid in cash not as a matter of charity but as a matter of obligation until Raja Udit attained majority when he granted *Khorposh* mouzahs, (e) Expenses of marriage, death and religious festivals paid by the Raj, (f) No evidence of joint worship, (g) Nanda Kishore had some separate properties.

So far as Raja Udit's period is concerned, the question of jointness would depend upon whether Nanda Kishore can be said to have been completely separated though in receipt of maintenance and the extraordinary expenses. This leads us to the question of the right to maintenance, and the effect of receipt of maintenance as bearing upon the question of jointness.

Maintenance.

In an ordinary joint Mitakshara family the junior members have an interest accruing by birth in ancestral property, and such interest carries with it a right to maintenance until partition is effected. Such a right is a real right and can be enforced against a stranger. In an impartible estate, however, the junior members do not acquire an interest by birth. There being no joint ownership in the sense of joint enjoyment with a right to partition, the question is—has a junior member any right to maintenance and if so, whether under the law or under custom?

In cases prior to *Sartaj Kuari* (1) it was held that he has such a right. In *Naragunty v. Vengama* (2) Lord Kingsdown observed "that a Polliam is in the nature of a Raj. It may belong to an undivided family, but it is not the subject of partition it can be held by only one member of the family at a time who is styled the Polliger, the other members of the family being entitled to maintenance or allowance out of the Estate". In *Beer Pertab Sahoe v. Maharajah Rajender Pertab Sahoe*, (3) Sir James W Colville said that the Hunsapore Estate was an "impartible Raj and by family custom descended on the death of each successive Raja to his eldest male heir according to the rule of

(1) (1887-88) L. R. 15. I. A. 51; I. L. R. 10 All. 272.

(2) (1861) 9 M. I. A. 66 (86); 1 W. R. P. C. 30.

(3) (1867) 12 M. I. A. 1 (18); 8 W. R. P. C. 15.

primogeniture who took the whole subject to the obligation of making to the minor members of the family certain allowance by way of maintenance."

In *Stree Rajah Yanumula v. Stree Rajah Yanumula* (1) their Lordships observed with reference to grants of portion of the impartible estate "these grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a Raj or impartible estate in favour of the junior members of the family, who but for the impartibility of the estate would be coparceners with him."

In *Periasami v. Periasami* (2) Sir James Colville spoke of such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindu family in the case of a Raj or other impartible estate descendible to a single heir.

In *Sartaj Kuari's case* (3) the High Court said that "the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant ownership."

It appears, therefore, that before *Sartaj Kuari's case* (3) the junior members' right to maintenance from an impartible estate was recognised, and such right seems to have been based upon the very nature of an impartible estate viz. that one person was to hold the estate and the others were entitled only to maintenance.

But after it was laid down in *Sartaj Kuari's case* (3) and in the *1st Pittapur case* (4) that there is no coparcenary in an impartible estate, the right of the junior members to maintenance under the law was expressly negatived in two cases.

In *Rama Rao v. Raja of Pittapur* (5) (the 2nd Pittapur case), it was held that apart from custom and certain relationship to the holder of an impartible estate, the junior members of the family have no right to maintenance out of it. After referring to a passage in Mayne's Hindu Law viz. "Those who would be entitled to share in the bulk of the property are entitled to have all their necessary expenses paid out of its income," their Lordships observed (page 153) "it follows that the right to maintenance, so far as founded on or inseparable from the right of coparcenary begins where coparcenary begins, and ceases where co-

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(1) (1870) 13 M. I. A. 333 (340); 13 W. R. P. C. 21.

(2) (1878) L. R. 5 I. A. 61 (70); I. L. R. 1 Mad. 312.

(3) (1887-88) L. R. 15 I. A. 51 (63); I. L. R. 10 All. 272.

(4) (1898) L. R. 26 I. A. 83; I. L. R. 22 Mad. 383.

(5) (1918) L. R. 45 I. A. 148; 28 C. L. J. 428.

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parcenary ceases," and after referring to certain exceptions (cases of disqualified persons, and cases of personal relationship) their Lordships observed (page 154): "An impartible zemindary is the creature of custom, and it is of its essence that no coparcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the zemindari were not impartible would be entitled as of right to maintenance."

In that case the claim for maintenance was sought to be enforced against the estate in the hands of the donee (the respondent) who had got the estate under a will from the late Raja; no custom was alleged, nor was any claim based on personal relationship. In the next case, the *Joy pore case* [*Vikrama Deo v. Pattamahadevi* (1)], however, the claim was not against a donee, but by a son of the brother of the Maharaja against the son of the Maharaja (the holder of the estate), and their Lordships followed the above decision [in the *2nd Pittapur case* (2)] that apart from custom and certain near relationships to the holder, the junior members of the family of a zemindar entitled to an impartible zemindary have no right to maintenance out of it, and remanded the case for an enquiry into the question of custom of maintenance. These two cases, therefore, laid down that there was no right of junior members to maintenance apart from custom.

The *2nd Pittapur case* (2), however, was considered by their Lordships in *Bajinath Prashad v. Tejbali* (3), and Lord Dunedin observed as follows:—"It must be always remembered that the claim for maintenance as put forward was made not against the head of the family of which the claimant was member, but against the donee who on the claimant's own allegations was a stranger to the family. It obviously could not, therefore, succeed unless it was of the nature of a real right. Now it could only be of the nature of a real right, no proceedings having taken place before the estate got into the hands of the donee, if the maker of the claim had before that event been a person who was in some way an actual co-owner of the estate, and any observations which go to the question of maintenance apart from the question of real right may be treated as *obiter dicta*. The decision, therefore, was the logical outcome of the decision in the *Sartaj Kuari's case* (4)."

It is contended on behalf of the defendant that Lord Dunedin

(1) (1919) 29 C. L. J. 528; 24 C. W. N. 226.

(2) (1918) L. R. 45 I. A. 148; 28 C. L. J. 428.

(3) (1921) 25 C. W. N. 564; I. L. R. 43 All. 228; 33 C. L. J. 388.

(4) (1887-88) L. R. 15 I. A. 51; I. L. R. 10 All. 272.

who delivered the judgment in the *2nd Pittapur case* (1) himself treated the "observations which go to the question of maintenance apart from the question of real right" as *obiter dicta*, with the result that the rule laid down in that case with respect to the right to maintenance (apart from the question of real right) is no longer law. It is true, the ground upon which the *2nd Pittapur case* (1) was distinguished in *Baijnath's case* (2) viz. that the claim in the former was against a stranger (the donee) does not apply to the *Joypur case* (3) (*Vikram Deo. v. Vikram Deo*) where it was made against the head of the family. The *Joypur case* (3) was cited in argument in *Baijnath Prasad's case* (2), but it is not referred to in the judgment. But the *Joypur case* (3) merely followed the *2nd Pittapur case* (1).

In *Baijnath's case* (2) the question related to succession to an impartible estate and not to maintenance of junior members, but the question of maintenance which was decided in the *2nd Pittapur case* (1) had to be considered in *Baijnath's case* (2) because some of the principles upon which the question of maintenance was decided, stood in the way of deciding the question of succession.

Now in *Baijnath's case* (2) Lord Dunedin pointed out that as no proceedings had taken place before the estate got into the hands of the donee [in the *2nd Pittapur case* (1)] the claim for maintenance could only be of the nature of a real right if the maker of the claim had before that event been a person who was in some way an "actual co-owner of the estate". The observations apart from those which go to show that the junior member is not an actual co-owner of the estate (in which case his right would have been a real right) are *obiter dicta*; in other words, those observations which go beyond what was necessary to show that a junior member is not an actual co-owner of the estate and was accordingly not entitled to enforce his right against a stranger were not necessary for the decision of the case. The counsel for the plaintiffs contends what that was said on subjects other than real right refers to observations in connection with the right of persons entitled to maintenance under special texts or because of personal disqualification. But these were not the only observations which were *obiter dicta*. There were other observations in the *2nd Pittapur case* (1) to the effect that the right to maintenance "so far as founded on or inseparable from the right of coparcenary, begins where coparcenary begins and ceases

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(1) (1918) L. R. 45 I. A. 148; 28 C. L. J. 428.

(2) (1921) 25 C. W. N. 564; 33 C. L. J. 388; I. L. R. 43 All. 228.

(3) (1919) 24 C. W. N. 226; 29 C. L. J. 528.

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where coparcenary ceases". Those and similar observations were not necessary for the decision of the case ; and Lord Dunedin in *Baijnath's case* (1) while reviewing the decisions was pointing out that they recognised a right of survivorship in the junior members in an impartible estate, and accordingly said that the observations in the *2nd Pittapur case* (2) apart from the question of real right may be treated as *obiter dicta*. It is to be noticed that if a junior member has no right to maintenance, it could not be made a real right by any proceedings. It seems, therefore, though it cannot be said to be absolutely clear, that the rule laid down in the *2nd Pittapur case* (2) as to there being no right of maintenance in an impartible estate (apart from custom and apart from special texts and personal disqualification) has been modified in *Baijnath's case* (1).

Reliance was placed on behalf of the plaintiffs upon certain decisions in support of the contention that even separated members may get maintenance, and that the receipt of maintenance, therefore, does not show jointness. The first case is the *Udayar-Palayam case* (3) where the suit was by a descendant of the third son of the Istemrar zemindar for partition of the estate (alleging that it was partible) and, in the alternative, for possession of the estate if it was found to be impartible, and as a further alternative for maintenance. There had been previous suits for maintenance by other persons in the plaintiffs' branch of the family which were decreed or compromised. The defendant pleaded that the estate was impartible and the junior members were entitled to and were getting maintenance. The trial Court held that it was partible property and over-ruled the plea of limitation on the ground that the other members by receipt of maintenance were participating in the property, on which the High Court held that the property was impartible and allowed maintenance to the plaintiff. On appeal, the Judicial Committee upheld the decree of the High Court. [See *The Udayar-Palayam case* (4)]. The plaintiffs relied upon the fact stated in the judgment of the trial Court (3) viz. "It does not appear that plaintiffs' father lived with the family of the zemindar at any time". But that the fact of separation in living did not affect the question of succession would appear from the next sentence, viz. "Istemrar zemindar's successor Muthu was living separately in Sriramgam before he succeeded to the zemindary", and the High

(1) (1921) 33 C. L. J. 388 ; 25 C. W. N. 564.

(2) (1918) L. R. 45 I. A. 148 ; 28 C. L. J. 428.

(3) (1901) I. L. R. 24 Mad. 562.

(4) (1905) I. L. R. 28 Mad. 508 ; L. R. 32 I. A. 261 ; 2 C. L. J. 231.

Court in dealing with the question of nearness of blood as determining the order of succession observed (page 609) "in an *undivided* family like the present, nearness of blood is immaterial". So notwithstanding the fact that the plaintiff or his father lived separately, and that there was constant litigation with the zemindar, the family was still considered as *undivided*, and the case therefore cannot be treated as one in which a separated member got maintenance.

In *Himmatsing v. Ganpatsing* (1) it was held that a suit for maintenance out of ancestral estate by a Hindu son lies against his father where the property in the hands of the latter is impartible. The son was disowned by the father but was held to be legitimate. The case was followed in *Ramchandra v. Sakharam* (2) (one of the Judges with great reluctance) where the father was in enjoyment of a political pension which was held to be impartible. In that case the son was turned out, not *separated*.

It may be pointed out that the High Court did not in the first case discuss the question of maintenance, as the defendant did not dispute the plaintiff's right to maintenance. The fact is that before the *2nd. Pittapur case* (3) no one questioned the right of junior members to maintenance in an impartible estate.

But even assuming that the junior members have no right to maintenance under the *law*, we have to consider the question of their right to it under custom. That they may have such right under custom is recognised in numerous cases, and in the *2nd. Pittapur case* (3) itself. In that case, Lord Dunedin observed at page 154:—"Just as the impartibility is the creature of custom, so custom may and does affirm a right to maintenance in certain members of the family. No attempt has been, as already stated, made by the plaintiff to prove any special custom in this zemindary. That by itself in the case of some claims would not be fatal. When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. In the matter in hand their Lordships do not doubt that the right of sons to maintenance in an impartible zemindary has been so often recognised that it could not be necessary to prove the custom in each case. It is this which will explain the reference to rights of maintenance in cases decided subsequent

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(1) (1875) 12 Bom. H. C. R. 94.

(2) (1877) I. L. R. 2 Bom. 346.

(3) (1918) L. R. 45 I. A. 148; 28 C. L. J. 428; I. L. R. 41 Mad. 782.

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to the decision in the case of *Sartaj Kuari v. Deoraj Kuari* (1). In *Yarlagadda v. Yarlagadda* (2), the judgment says "As to the zemindary estate the Board held that it was impartible and the consequence is that the plaintiffs as the younger brothers of the zemindar retain such right and interest in respect of maintenance as belong to the juniormembers of a Raj or other impartible estate descendible to a single heir." But their Lordships may agree here with what was said by the Court in the case of *Nilmony Singh Deo v. Hingoo Lal Singh Deo* (3) "We can find no invariable or certain custom that any below the first generation from the last Raja can claim maintenance as of right."

In the case before us, it is not disputed and in fact it is proved, that Nanda Kishore and Brojo Lal (the brothers of Raja Udit) and their descendants have been getting maintenance in cash or by grants of land all along. On behalf of the plaintiffs, it is contended that they got maintenance under a family custom. On behalf of the defendants it is contended that even if it is under a custom it does not affect their right to it.

It is true that once it is held that the holder of an impartible estate can give away the estate by transfer *inter vivos* or by a testamentary disposition, he can destroy any right of maintenance which the junior members may have unless it is made a real right. But the same may be said of the right of succession. That, however, by itself would be no ground for holding that the junior members have no right of succession. The question of the right to maintenance or to succession would have to be considered only in cases where the estate has not been given away to a stranger and is vested in a member of the family according to the law of succession. If a junior member's right to maintenance is based upon law, there would be no difficulty in holding that their receipt of maintenance shows jointness, because that is the only way in which he can participate in the family property (the impartible estate). But assuming that a junior member has no right to maintenance under the law, the point for consideration is whether his right to it under custom is any indication of jointness.

An impartible estate is a creature of custom, and the right of junior members to maintenance is also under the same custom. Now, custom has origin in an agreement by which the members agree that one of them (the eldest) in certain order of succession should hold the estate, the other members being entitled to main-

(1) (1887-88) L. R. 15 I. A. 51.

(2) (1900) L. R. 27 I. A. 151 (157).

(3) (1879) I. L. R. 5 Calc. 256 (259).

tenance. In *Rao Kishore Singh v. Musst. Gahenbhai* (1) Lord Atkinson observed :—" No doubt one of the ways in which impartible estates may originate is by independent Chiefs or feudatories exercising almost autocratic powers, being gradually in course of time reduced by a paramount power to the positions of ordinary zemindars, but these impartible estates may also owe their origin to family arrangements followed up in practice for many generations, whereby it was originally agreed that the family property should be impartible and be held and managed for the benefit of the whole family by a single member at a time in a certain order of succession, the other members being entitled to maintenance only, without any power of interference with the management."

There is nothing to show that the Jheria Rajas were independent Chiefs or feudatories exercising autocratic powers, at any time. Although the Chiefs in the jungle mahals before the British Government exercised semi-sovereign powers, there is evidence that the Raja of Jheria was subordinate to the Raja of Pachete, the principal zemindar in Manbhum. The latter portions of the observations referred to above would therefore apply to an impartible estate like the Jheria estate.

An impartible estate is by its very nature incapable of common enjoyment or being the subject of co-ownership and in that sense of course there can be no jointness in estate. But the receipt of maintenance (whether under the law or under custom) may in the absence of other circumstances be the only mode in which jointness in estate (in a limited sense and in so far as is consistent with an impartible estate) be kept up in an impartible estate.

It is difficult to see, how else the junior members can in some cases keep up jointness in an impartible estate. The junior members cannot *compel* the holder of the estate for the time being to allow them to reside with him in the same mess and worship which might be inconvenient to both parties, and if the junior members are separate in mess and worship while connection with the estate is kept up by receipt of maintenance, the question arises whether, in the absence of other circumstances, the mere fact of separate mess or worship would constitute such a separation as would bar their right to succession. In the *first Pittapur case* (2) the adopted son quarrelled with the Raja and ceased to reside with him. The Raja gave him some moveables and

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(1) (1919) 24 C. W. N. 601 (609).

(2) (1898) L. R. 26 I. A. 83.

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money for the expenses of his marriage and Rs. 2000 per month for his maintenance. That evidently was not considered to constitute separation, because, if it was, it would have been unnecessary to consider the question whether the Raja had power to make a testamentary disposition of the estate, or to refer to *Sartaj Kuari's case* (1). It was no doubt held that the coparcenary between the Raja and the adopted son was "not admitted but the contrary is held". That meant (as observed in *Protap Chandra v. Jagadish Chandra* (2) that by reason of the decision in *Sartaj Kuari's case* (1) the coparcenary (which under the Mitakshara law is created by birth) did not exist as a matter of law between the Raja and the adopted son.

In the judgment of the High Court in *Mohesh Chunder Dhal v. Satraghan Dhal* (3) Ghose and Gordon JJ. observed as follows:— "Although Kamala Kant when he succeeded to the Jambuni Raj practically separated from the Ghatsila branch of the family, yet as a matter of law, he and his son Nityananda still continued to be joint with the Rajas of that branch. The fact that after he succeeded to the Jambuni estate he continued to hold four mouzahs on allotment of maintenance, that on his death two of them were possessed by his son Nityananda and two by his son Mangobinda and also that on the demise of Nityananda one of these mouzahs passed to his son Jagjiban and two others were assigned to him for maintenance by Ram Chandra III in 1884, are all inconsistent with the supposition that the Jambuni branch had separated in estate from the Ghatsila branch". The question, however, was not seriously pressed in the High Court by the defendant, and the question was not raised at all before the Judicial Committee and therefore not considered by it.

In the case of *Harpal Singh v. Lekhraj Kunwar* (4) where a number of villages were appropriated for the maintenance of the junior members of the family (some of which were sold and the members of the family had therefore expropriatory rights therein) the Allahabad High Court (Stanley C.J. and Banerji J) held (408-409) that "the members of the family are therefore still joint in estate though they are separate in food and worship. Whatever be the rights of the family in these villages, they form part of the estate and if the junior branches become extinct will revert to the head of the family". The case went up to the Privy Council,

(1) (1887-88) L. R. 15 I. A. 51; I. L. R. 10 All. 272.

(2) (1924) 40 C. L. J. 331 (339).

(3) (1901) I. L. R. 29 Calc. 343 (346-347). (4) (1908) I. L. R. 39 All. 496.

but this portion of the judgment was not referred to, though the judgment was generally upheld [See *Thakurain Lekhraj Kunwar v. Thakur Harpal* (1)].

In the judgment of the High Court in the case of *Protap Chandra v. Jagadish Chandra* (2) (a case relating to the Dhalbhum estate now pending in appeal before the Judicial Committee) it was observed (page 344) "according to custom the members of the joint family not only got maintenance, but education and marriage expenses also, so that there was actual enjoyment by the members of the family so far as was consistent with the impartibility of the estate", and a distinction was drawn between "jointness in fact" and "coparcenary in law" (see page 339). But the case related to succession, and not to maintenance. It was found by the trial Court that the defendant was joint in estate with the Raja, the defendant did not press his objections to the finding and there was ample evidence in support of it.

The question has never been specifically raised nor decided by the Judicial Committee.

The plaintiffs strongly rely upon the *Telwa case* [*Thakurani Tara Kumari v. Chaturbhuj Narain* (3)]. There are some points of similarity between that case and the present, but there are some important points of difference also. In the *Telwa case* (3) as well as in the present, there was separate residence and mess. But the separation in those respects in the *Telwa case* (3) took place under circumstances different from those in the present. In that case it was found that Bhupat was a man of licentious habits, who made himself a nuisance to his brother Ranjit and created a scandal by introducing mistresses into the family dwelling house, and it was in consequence of this that Ranjit executed the maintenance grant to enable him to start a separate establishment. Bhupat thereupon himself built a separate house, a Tulshi Pinda and a separate Thakurbati. The separation took place at the time the *khorposh* grant was made, (in 1879), and the subsequent conduct was relied upon as evidence of separation. In the present case, it is true, Rani Tara Kumari refused to return to the Rajbati notwithstanding the repeated requests of Rani Kadam Kumari, and lived separately at Puranagarh all along. But Rani Tara Kumari or Nanda Kishore did not build any separate house. Puranagarah was the old family residence: it belonged to the Raj, the

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(1) (1911) L. R. 39 I. A. 10 ; I. L. R. 34 All. 65 ; 15 C. L. J. 72.

(2) (1924) 40 C. L. J. 331 (339).

(3) (1915) L. R. 42 I. A. 192 ; I. L. R. 42 Calc. 1179 ; 22 C. L. J. 498.

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cost of repairs was borne by the Raj (except on one occasion) and if any house was built it was at the expense of the Raj. In the *Telwa case*, (1) there was a perpetual *mokarari* grant—a grant in excess of the usual maintenance grant (for life) to junior members and the grant appears to have been made by Ranjit who was displeased with the conduct of Bhupat, and with a view to separate him. In the present case Nanda Kishore also set up a perpetual *mokarari* grant, but it was found by the Courts to be a grant for life only, Nanda Kishore was getting maintenance allowance in cash from 1837 and Raja Udit made a *khorphosh* grant of mouzahs instead of the cash allowance, in 1850. It was not made with a view to separate Nanda Kishore, because he was separate in mess and residence from 1837. In impartible estates junior members get maintenance, but they are ordinarily grants for life. It was held in *Rameshar Bakhsh v. Arjun Singh* (2) that when a grant for maintenance is made to a junior member of a joint family it is *prima facie* the intention that the gift should be for life. In *Beni Pershad Koei v. Dudd Nath Roy* (3) a grant “in lieu of maintenance” was held to be *prima facie* resumable on the death of the grantor. In *Tituram v. Cohen* (4) in which the *khorphosh* grant to Nanda Kishore was considered, the grant was held by the High Court and the trial Court at the most to be for the life of the grantee, and the Judicial Committee (at page 217) agreed in the conclusion. If, therefore, the grant is perpetual it is in excess of their rights and may indicate an intention to separate the junior member from the family. An impartible Raj may not be partitioned, but a portion of the estate may be given by the owner of the impartible Raj to a junior member in consideration of his giving up all his rights whatever they may be, and evidently the *mokarari* grant to Bhupat by Ranjit which was made in order that he might start a separate establishment was so considered in the *Telwa case*, (1) as there could be no separation in estate in any other sense, there being nothing to show that there was any property other than the impartible estate. On the other hand, a *khorphosh* grant may be made to a junior member in recognition of his right to maintenance (whether under the law or under a custom) as a member of the family, and in such a case it cannot be said that there is complete separation.

(1) (1915) L. R. 42 I. A. 192; I. L. R. 42 Calc. 1179; 22 C. L. J. 498.

(2) (1900) L. R. 28 I. A. 1; I. L. R. 23 All. 194.

(3) (1899) L. R. 26 I. A. 216 (220); I. L. R. 27 Calc. 156 (161).

(4) (1905) I. L. R. 33 Calc. 203 (209); L. R. 32 I. A. 185; 2 C. L. J. 408.

Bhupat built a *Tulshi Pinda* and a separate Thakurbari. In the present case, the *Tulshi Pinda* existed at Puranagarah from before, presumably from the time of the ancestor of Raja Sangram, and the Siraghar probably existed from before as it is not proved that Nanda Kishore built any Thakurbati, though it was the plaintiffs' case that he did so. Bhupat in his written statement alleged that "besides the *khorposh* grant out of the joint property, the junior members were entitled to obtain the expenses of marriage, *Sradh* and other similar ceremonies and all other necessary expenses from the income of the said property in the hands of the holder of the estate for the time being." It was found however on "incontestable evidence" that he did not get any, and that the expenses of the marriage (of his grand-daughter) were defrayed by Bhupat by borrowing money and not by Ranjit. The observation that "the defendant's written statement having regard to his evidence and to the findings of the Court below was instructive" shows that importance was attached by their Lordships to the said circumstance. In the present case so far as the documentary evidence is obtainable, Nanda Kishore's family used to get extraordinary expenses such as on occasions of births, deaths and marriages (some of them being celebrated at the Rajbati), and during Raja Durga Prasad's time they used to get other expenses also. It may be that Nanda Kishore got the extraordinary expenses under a custom, and it does not appear whether there was any such custom proved in the *Telwa case*(1) But the fact remains that the defendant in the *Telwa case* (1) set up a practice and failed to show that he got any extraordinary expenses. In the present case Nanda Kishore's family did get such expenses.

In the *Telwa case* (1) the defendant Chaturbhuj (son of Bhupat) in a criminal case asserted that he was "separate" from Ranjit. That statement was no doubt made in 1905 long after the *mokarari* patta which was granted in 1879 but the statement was used to support the separation in 1879.

In the present case Nanda Kishore referred to "my *garh*" or "separate *garh*" and used other similar expressions, but they had reference only to separate *residence*. As for the statement by Nanda Kishore and Abodh Behary in the mortgage bond, dated the 1st April 1891 that Tisra and Golokdih were granted by the "Jheria Raj family" we have already dealt with it.

The Judicial Committee observed in the *Telwa case* (1) that the only issue in the case was one of fact, namely, the issue as to

(1) (1915) L. R. 42 I. A. 192; 1. L. R. 42 Calc. 1179; 22 C. L. J. 498.

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whether Ranjit and Bhupat separated. Upon the facts of the case the High Court came to the conclusion that there was no complete separation, the Judicial Committee on the other hand held that there was complete separation, in food, worship and estate. No new rule of law was laid down in that case and we think that the present case is distinguishable from it in its facts. In the *Serampore case* (1) also there was a *moharari* grant of a village by way of maintenance, and the Court found upon the evidence that there was no separation in food, worship or estate. It is contended on behalf of the plaintiff that if enjoyment of maintenance was sufficient to constitute jointness, it would have been unnecessary to go into the question of jointness in mess and worship. That is so, and it cannot be affirmed that the mere receipt of maintenance in all circumstances is sufficient to constitute jointness. But in the absence of other circumstances going to show separation, the receipt of maintenance indicates jointness. Whether it does so or not would depend upon the circumstances of each case.

It is contended, however, on behalf of the plaintiff that under the family custom of the Jheria Raj not only Brojo Lal's and Nanda Kishore's branches but persons who were admittedly not members of the joint family and distant relations also used to get maintenance.

Reference was made on behalf of the plaintiffs to the list of *khorphoshdars* annexed to the report of Poresb Ghose (Manager under the Court of Wards) dated the 21st February 1869. That document was produced by the defendant in order to meet the case made in the plaint that neither Nanda Kishore nor Brojo Lal's branches ever got any help from the Raj, but the plaintiffs rely upon it to show that besides Nanda Kishore and Kunjo Behari (son of Brojo Lal), under the family custom, separated members and distant relations also got *khorphosh mouzahs*. The list shows that certain persons Guru Prasad Singh, Dhan Singh, Ramsingh, and Mani Nath Singh also had *khorphosh mouzahs*.

We are, however, unable to hold that separated members of the Jheria family got *khorphosh* under a *family custom* for the following reasons. In the first place, the custom was not set up in the pleadings (nor even in the grounds of appeal to this Court), and the Court, therefore, had no opportunity of investigating who those persons (Dhan Singh Babu and others) were, and under what circumstances and by whom the grants were made. It is true that a

(1) (1922) L. R. 50 I. A. 1 ; 37 C. L. J. 287,

few questions were put to Rani Chatura Kumari about some *khorphoshdars* but no *custom* was set up nor was any issue raised with regard to it. Poresb Ghose on being cross-examined by the defendant stated that he did not know where those persons lived or when the *khorphosh* grants were made, but that he entered those grants in the "scheme prepared by him" depending upon the report which the Raja's mother caused to be given by the officers of the estate. Their names do not appear in the pedigree and there is nothing to show how they were related to the Jheria Rajahs; the only thing appearing in the evidence is that they were distant relations (see Ex. L 19), and used to come to Jheria on ceremonial occasions. One of them, Guru Prasad, appears from the deposition of Raja Rash Behari (in the Pandra case) not to belong to the Jheria but to the Pandra family, and he could not possibly belong to the Jheria family as marriage is permissible between him and the Jheria family. Another *khorphoshdar* was Mani Nath Singh of Gundabar, and it appears from the cross-examination of Rani Chatura Kumari, that Bara Kumar's maternal uncle's house is at Gundabar. In the next place, their names appear for the first time in 1889. We do not find any mention of them in the papers of the Court of Wards during the minority of Udit or Rash Behari which indicates that the grants were made subsequently, after Rash Behari became the Raja, and he might have made them to distant relations as he was entitled to grant to any person he liked. Such grants may be made to any relation by a Raja; for instance, some one connected with the family of his father-in-law or his maternal uncle, or even to illegitimate children. The grant of *khorphosh* to such persons would not affect grants made to members of the family, as a grant of maintenance may be made as a matter of grace and not in recognition of any *right* to it.

Thirdly, there is nothing to show that the *khorphosh* grants to Dhan Singh Babu and others was made under any *family custom*. The custom referred to in cases relating to impartible estates is only the custom of the junior members of the family within certain degrees getting maintenance, and the mere fact that some Raja made *khorphosh* grants to distant relations or even to separated members by way of charity cannot affect the position of a *khorphoshdar* such as Nanda Kishore or Brojo Lal who were entitled *as of right* to maintenance from their elder brother Raja Udit upon whom the ancestral estate had devolved.

Lastly, there is a statement in the Court of Wards' papers (Ex. P dated the 4th March, 1861) in connection with the *Sradh* of

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Brojo Lal, that the zemindar of Jheria is bound by family custom to pay any extraordinary sum incurred by *khorposhdars*. It does not appear that in 1861 Dhan Singh and others were in enjoyment of the *khorposh* grants. But assuming they were, there is no evidence that they were ever granted any extraordinary sums incurred by them on the occasion of birth, death or marriage (which were granted to Nanda Kishore's and Brojo Lal's branches on numerous occasions), and that shows that Dhan Singh and other *khorposhdars* were not members of the family or *khorposhdars* in the sense in which the expression was applicable to Nanda Kishore or Brojo Lal. The mere fact that certain mouzabs were given to them (Dhan Singh and others) by way of *khorposh* grants therefore does not show that they were entitled to maintenance as a member of the Jheria family or under any custom.

It is contended on behalf of the plaintiffs that custom varies in different families as to the persons entitled to maintenance—in some only the son, in others descendants down to the 3rd generation; in some the grant enures only for the life-time of the donor or the donee or both, in others it descends to male descendants, so that in each family the question is whether a particular person falls within the limits of relationship to which the right is confined. In the case of Babuana grants, the descendants get it from generation to generation. That may be so, but in all cases of *khorposh* grants, there is always the possibility of a reversion to the parent estate on the extinction of heirs of the grantee, and so far as Babuana grants are concerned, they are made under a special family custom.

The plaintiffs also referred to the case of *Nilmony Singh Deo v. Hingoo Lall Singh* (1) in which it was held that in the case of the impartible Raj of Pachete, there is no law or custom under which any one not being a son or daughter of a deceased Raja can claim of right either maintenance or a grant in lieu of maintenance from the person in possession for the time being of the Raj. That case was relied upon by Lord Dunedin in the 2nd. *Pittapur case* (2) in support of the view that only the son is entitled to maintenance. The Pachete estate, however, is governed by the Dayabhaga. See *Nilmony Singh Deo v. Baneshur* (3) where it is stated that "this family is absolutely governed by the Dayabhaga." It is unnecessary, however, in the present case to discuss the question considered in the 2nd. *Pittapur case* (2) as to how far the descendants

(1) (1879) I. L. R. 5 Calc. 256.

(2) (1918) L. R. 45 I. A. 148; 28 C. L. J. 428.

(3) (1878) I. L. R. 4 Calc. 91 (93).

are entitled to maintenance because Nanda Kishore was the son of Raja Sangram Singh and the brother of Raja Udit, and Nanda Kishore died in 1915, only one year before the death of Raja Durga Prasad, with whom he was admittedly in commensality at any rate for sometime before his death. He was, therefore, entitled to maintenance in any case.

For all these reasons, we are unable to hold that the plaintiffs have proved any *custom* under which separated members of the Jheria Raj family are entitled to get maintenance from the estate.

The question, therefore, is whether the receipt of maintenance under the circumstances of the present case shows jointness.

As already stated, Nanda Kishore was residing separately but at Puranagarh belonging to the Raj, the costs of repairs of houses being paid by the Raj. He was messing separately, but that was in consequence of his residing in a separate house at Puranagarh. He, however, received his maintenance and clothes from the Raj and expenses of occasions of marriage, deaths and religious festivals from the Raj. It cannot be said therefore that he was completely separate in food from the Raj. Raja Udit made the *khorphosh* grant not with a view to separate him, because he was already living separately, but in lieu of the maintenance paid in cash. All these he got not by way of charity, but *as of right* and we have found that no custom has been proved of a person not a member of the family being *entitled* to extraordinary expenses.

In these circumstances, we are unable to hold that there was *complete* separation during the time of Raja Udit.

It is true as pointed out in *Moolji v. Gokuldas* (1), that even in the case of a separated family, blood relationship within certain degrees imposes a moral though not a legal duty towards indigent relatives. The support on a liberal scale of poor relations and even the payment of the expenses of their marriage ceremonies are not in themselves without other evidence, proof of a joint family. In *Dioki Singh v. Musammatt Anupa* (2), their Lordships held that the payment of maintenance and expenses of marriage and other ceremonies are not inconsistent with the position of a separated member and that they are natural and probable. But apart from the fact that those cases related to partible estates, these considerations do not apply to the present case as Nanda Kishore did not get such expenses as a matter of social obligation but *as of right*.

And having regard to the subsequent treatment by the successors of Raja Udit—the facts that besides granting maintenance and

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(1) (1883) I. L. R. 8 Bom. 154 (158). (2) (1905) 10 C. W. N. 338.

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expenses of religious festivals some marriages and *sraddhs* in the junior branches were celebrated by the Raj as a family concern even during the time of Raja Rash Behari and Jaimangal (which is all that a junior member can expect in an impartible estate) not to speak of the time of Raja Durga Prasad who treated the members of the junior branches as members of the same family, it seems that a living connection was kept up between the Raj and Nanda Kishore's and Brojo Lal's branches. We have not come across any case in which it has been held that in such circumstances there was complete separation so as to bar the contingent right of succession of a junior member to an impartible estate.

Will, Bantannama, Khorposh deeds. Am-mukhtearnama. suit against the Bank &c.

As already stated, Raja Durga Prasad is said to have executed a will on the 27th August 1915.

It appears that the draft of a will was sent to Sir Rash Behary Ghose for opinion. The draft has not been produced, but the letter of Sir Rash Behary dated the 24th October 1914 to Mr. Smith, Manager of the Jheria estate, Exhibit M (28), shows that his advice was asked on two points particularly and generally to advise in the matter. The two points related to cash, diamonds and other valuable jewellery. He made some suggestions on these two points. He also pointed out that the provisions in the draft showed that the Raja was under the impression that he had not absolute power of disposal of everything belonging to him, whether moveable or immoveable, but that he had such powers, that the recital in the will was sure to invite litigation, as some distant kinsman might come forward on the ground that he was joint in estate with the Raja or that females are excluded from succession or on both those grounds. He expressed his strong opinion that a fresh will should be drawn up giving such interest to the Ranis as the Raja thought proper for their natural lives, and as to "my knowledge the Raja has no near relation whom he would like to succeed to the Raj", he might give the estate to some charitable purpose, and that the Raja should by his will make such dispositions of his whole property as he thinks proper, and not merely of one-half of the cash including Bank deposits and of his personal jewellery. He said he certainly could not approve of the draft will, and suggested that Mr. Smith or Lalit Kishore or both should see him with full instructions from the Raja. The draft, as stated above, has not been produced nor the case for

opinion, if there was any. Mr. Smith says the draft cannot be found, and Lalit Kishore cannot say what became of it, nor has the Press Copy-Book been produced.

The learned Advocate-General tried to reconstruct the draft with reference to the letter of Sir Rash Behary and urged that the second draft prepared by Lalit Kishore (to be referred to presently) was on the lines of the draft sent to Sir Rash Behary, incorporating the suggestions made by him. We do not think it would be profitable to discuss the question as it would be more or less a matter of speculation.

Lalit Kishore made some pencil notes on the margin of the letter [Exhibit M28 (a)] "Schedule to be prepared of the jewellery". "The Raja Saheb intends to reserve his right of making a fresh will granting a life estate to each of the Ranis in succession". Lalit Kishore was asked to make two drafts one incorporating the suggestions made by Sir Rash Behary and the other giving successive life estate to the Ranis, and he accordingly on the 11th April 1915 made two drafts.

In one of them (Exhibit Z265) after stating that Perganahs Jheria and Joynagar were the ancestral zemindary of the Raja and that he had other immoveable properties, it was provided "After my death whoever will be my successor shall get all those properties and there is no necessity for making any provisions for it, but a 6 annas share of the valuable diamonds and jewels mentioned in the schedule appended hereto as also of the hard cash or notes that shall remain in my purse or in the Bank of Bengal or in any other Bank at the time of my death shall appertain to the zemindary, and whosoever shall get my zemindary shall hold and enjoy possession thereof and the remaining 10 annas of the said diamonds, jewels, notes and cash money shall be appropriated by my wives equally and they shall have full *maliki* right therein..... My wives shall each get Rs. 3600 annually as maintenance" and the maintenance was made a charge on the estate.

The other draft (Exhibit Z 266) gave successive life interest to the three Ranis and after them "my Sriman—and his sons and grandsons in succession shall be in possession and enjoyment in *maliki* right", the name being left blank. There was a provision that the Ranis other than the one getting the *Gadi* would get maintenance in the same way as they would have obtained it had the will not been executed.

This bears a note "settled by me R. Ghose," at the top, and "The idea not approved by the Raja Saheb" at the back of it.

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The will said to have been executed by the Raja on the 27th August 1915 is in accordance with the first draft of Lalit Kishore (Exhibit Z265) with a few additional provisions.

The will is an unregistered one, and has not been proved in the Probate Court, but evidence has been adduced in this case to prove its execution. The plaintiffs' contention is that the signature may be genuine, (though a signature on blank cartridge paper was suggested in cross-examination), but that they do not admit that the will was read over and explained to the Raja, or that it was executed as a will; and that the witnesses who spoke to its execution had been very largely rewarded by the defendant. The attesting witnesses were two pleaders, Charu Chandra Chatterjee and Sisir Kumar Mitter, Mr. Smith, Kirti Bakshi and Kedar Nath Banerji. Charu Chandra, Mr. Smith and Kirti Bakshi have been examined by the defendant and Kedar Nath Banerji is looking after the plaintiffs' case. It is true that some of the attesting witnesses got large rewards from the Raj, but the Court below has considered the suggestion made on behalf of the plaintiffs of the use of cartridge papers signed in blank, the evidence of witnesses, and the circumstances under which the will was found in the despatch box by Mr. Luby when he came to Jheria, and has come to the conclusion that the will was executed by the Raja. We see no sufficient reasons for differing from the finding arrived at by the Court below on the point.

It is contended that no witness has said that the Raja had sufficient testamentary capacity at the time of execution, and certain authorities have been cited to show that it is necessary to prove it, even where the will is sought to be used only for a limited purpose. But ordinarily the execution of a will by a competent testator raises the presumption that he knew and approved of the contents of the will, if nothing appears to the contrary; and in the present case the testamentary capacity was not challenged. No objection on the point was taken in the Court below, nor in the grounds of appeal to this Court.

It is pointed out that one of the witnesses to the will viz., Charu Chandra Chatterjee stated that he did not get his fees as the Raja died immediately after. The will was executed on the 27th August 1915, and he died on the 7th March 1916. It is accordingly suggested that the will must have been prepared shortly after his death. But Charu Chandra in the next sentence corrected himself

and said that the Raja got *ill* immediately afterwards, and so he did not get his fees, and having regard to the fact that a draft was sent to Sir Rash Behary and his advice was taken and alterations were suggested by him, that subsequently two fresh drafts were made by Lalit Kishore, and the Raja survived the execution by about 8 months, we do not think that there is any force in the plaintiffs' contention.

It is contended by the plaintiffs that although the will may be genuine, it can be used for a collateral purpose only, and not for proving the dispositions made by it, as no probate has been taken of it from the Probate Court, and it is pointed out that the defendant himself at one time, was disputing the will.

Having found that there was no complete separation it is unnecessary to discuss the arguments based upon the will as to whether the defendant was joint with Raja Durga Prasad. But this question as well as some other questions are discussed by us in detail as they have been argued before us.

The provisions of the will are relied upon by the defendant for showing that Raja Durga Prasad expected that his Ranis would not, but that some one else would succeed him, and that he in this belief made a disposition of only a 10 annas share of the jewellery cash etc., and provided for their maintenance.

It is contended by the plaintiffs that the will cannot be looked at for such purposes, because that would be referring to the dispositions made by it.

Under section 187 of the Probate Act, (Indian Succession Act ?) the will cannot be used for establishing any right as executor or legatee. In the present case the defendant is not seeking to establish any such right, but relies upon the will only to show what the intention of the Raja was with regard to his estate. But assuming that the will is admissible in evidence, what does it prove? it is pointed out that the bequest of only a ten annas share of the jewellery and cash &c., to the Ranis, and the provision that the remaining 6 annas would form part of the zemindary and would go to his successor, and specially the charge upon the estate for the maintenance of the Ranis, is inexplicable had the Raja any idea that the Ranis would succeed him. This is a legitimate inference from the provisions of the will, but it does not necessarily follow, as contended for by the defendant, that it was due to the idea on the part of the Raja that the defendant Siva Prosad was *joint* with him.

It appears that Raja Durga Prasad was under the impression that females could not succeed. He told Kirti Baksi that females

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did not succeed in Jheria. Not only the Raja, but the officers of the estate, Kirti Bakshi and other Amlas, were of the same opinion, and that might have induced him to make the will in that manner. In spite of the advice of Sir Rash Behary to which reference has been made, the Raja did not make any disposition of his estate. He followed the advice of Sir Rash Behary only with regard to cash, notes etc. The only thing he did was to give a 10 annas share of the jewellery &c, to the Ranis and to provide for their maintenance. This shows that his only object was to provide for the Ranis who he believed were excluded, and as regards the estate (and the remaining 6 annas share of the jewellery &c) he allowed the law to take its own course. The draft will sent to Sir Rash Behary, as already stated, has not been produced, but his letter to Mr. Smith (Exhibit M28) would be inexplicable if he was told that the defendant or any one else was joint with the Raja, and there is no statement in any of the drafts or in the will that the defendant was joint with him.

It appears that after the death of Janaki Prasad, Golap Chandra Sarkar, an eminent Hindu lawyer, was consulted by the Raja. The opinion of Golap Sarkar was found in one of the boxes when Mr. Luby went to Jheria after the death of Durga Prasad. It is said to have been filed in the case for mutation of names in the Collectorate by the defendant which (it is contended) shows that the opinion was favourable to the defendant. It has not been produced. We do not know what facts were stated in the case for opinion nor what his opinion was. In these circumstances, it is useless to speculate as to what Golap Sarkar had in his mind when he gave his opinion.

Reference is made to the evidence of Dr. Brown who came to Jheria to treat Raja Durga Prasad for impotency. He stated that on his last visit in April, 1915, the Raja pointed out Siva Prasad as his distant relation who would be his successor in case of his not having a son. Objection is taken to its admissibility in evidence as it does not come under any of the clauses of section 32 of the Evidence Act, not being a statement as to relationship. The defendant relies upon the case of *Lloyd v. Powell* (1). But that was a case under the Workmen's Compensation Act, under which compensation is payable to a dependent of the deceased, and the question was whether it was the intention of the deceased to fulfil his duties as a father. It was found that the deceased would have brought up the child and supported him, and his state of mind was

(1) (1914) A. C. 733 (751).

therefore relevant. But in the present case, the state of mind of Raja Durga Prasad cannot be said to be relevant. *We do not think therefore that the decision applies to the statements of Dr. Brown. But even if admissible in evidence, the statement by Raja Durga Prasad that the defendant would be his heir does not *necessarily* show that the defendant was joint with because if the Raja believed in female exclusion he might have thought that Siva Prosad would be his heir. The Raja had some mistaken notions about the incidents of the Raj. In the *Luchmipore case* (1) he deposed that there could be no adoption, but the Court held the contrary. He was under the impression that females could not succeed—he said so to Kirti Bakshi. It appears from Sir Rash Behary's letter that the Raja was under the impression that he had no power of alienation. In these circumstances, no clear inference can be drawn that defendant was joint with him from his statement to Dr. Brown that the defendant would be his successor. For the same reason the passage cited from Phipson on Evidence, 6th Edition page 63 does not help the defendant. Besides, there was no statement about jointness, and Durga Prasad's treatment of Janaki and the members of Nanda Kishore's family might be explained by his belief that females were excluded from succession, and in any case would not affect the question of an earlier separation if any.

We are, accordingly, of opinion that the drafts and the will do not contain any clear statement that the defendant was joint with the Raja. The estate and the 6 annas of the jewellery, cash &c. were to go to the person who would succeed him (according to law) and it is, accordingly, contended by the plaintiffs that had Siva Prosad been intended to be the successor there is no reason why his name should not have been mentioned in the will. An explanation was given by defendant's witness Kirti Chandra Bakshi viz, that the Raja did not mention the name, because Pran Krishna, Krishna Prasad and Jagananda were related by marriage to one or other of three Ranis, and if he had named the heir, each of the Ranis would press the claim of her relation and there would be trouble. But Siva Prosad was not married to any relation of the Ranis, and if there was Golap Sarkar's opinion that he would be the successor according to law and custom, we do not see that there was any difficulty in the way of the Raja's naming him as his successor.

(1) (1922) L. R. 50 I. A. 58.

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Raja Durga Prasad died on the 7th March 1916 and within an hour of his death, the name of the defendant was entered in the *rohars* of the Raj. Telegrams were at once sent to Lalit Kishore and Mr. Luby, the Sub-Divisional Officer of Dhanbad, Lalit Kishore arrived at Jheria on the same day and Mr. Luby the next morning. Mr. Smith says that 3 or 4 days before Raja Durga Prasad's death, when his condition became hopeless, he saw Mr. Luby as he apprehended opposition on the part of Pran Krishna and Krishna Prasad, to the succession to the Raj. The Deputy Commissioner in his letter, dated the 7th March 1916 (the date of Raja's death) informed the Commissioner that as there was considerable doubt as to the succession he was under section 29 of the Court of Wards Act, taking possession of the moveable property and instructing Mr. Luby to take the necessary action, keeping on the present manager Mr. Smith as manager under the Court of Wards.

On the arrival of Mr. Luby at Jheria on the 8th March, Lalit Kishore put forward the claim of the defendant and said that the Court of Wards had no jurisdiction. But Mr. Luby proceeded to make an inventory of the moveables. Boxes were brought out from the inner apartments, a despatch box was broken open, and the will, the drafts and Golap Sarkar's opinion were found. Mr. Luby took with him the will and the opinion.

The Court below finds "It is clear that they apprehended opposition from Pran Krishna and others as well as from the Ranis, although they say that they did not apprehend any opposition from the Ranis. Mr. Luby did not remove the moveables such as cash and jewelleries as he was told by Mr. Smith that he would hurt the feeling of the Ranis. All the valuables and the unopened safes were left on 8th March 1916 in the custody of Mr. Smith by Mr. Luby. It should be noted here that the cash in the treasury was not shown to Mr. Luby, and Mr. Smith kept it back from Mr. Luby. It appears that the *amlas* including Mr. Smith went on spending the cash in the Treasury on behalf of the defendant." We think that this is a correct statement of the position.

No claims appear to have put forward to the Raj by the Ranis, Invitations for the *Sradh* which means also invitations for the "Tika Pugree" of the successor were issued in the name of the defendant to the neighbouring Rajas, zemindars and relations including the paternal relations of the Ranis. The "Tika Pugree" ceremony took place in the presence of all these relatives and members of the *Chowrasi gadi*. *Chuman* presents

were given by the Ranis' relations and the other persons invited. Even the female relations of the Ranis came on the occasion. The installation of the defendant on the *Gadi* was celebrated with pomp. It is clear that the defendant was installed on the *Gadi* without opposition on the part of the Ranis or any body else. The defendant next got mutation of his name in the Collectorate without opposition by the Ranis. He then proceeded to give large rewards to those who had helped him in securing the succession.

It is said that the Ranis relied upon the will and it appears from the letter Exhibit M (13) dated the 19th July 1916 that they wrote to the Deputy Commissioner for the will. But it does not appear that they were aware of its contents. There is no evidence that they had knowledge of the will before the Raja's death. Kirti Bakshi says that he gave information about it to the Ranis "a day or two after the Raja's death." In that letter the Ranis requested the Deputy Commissioner to "come and manage our property."

However that may be, it seems that the defendant having secured the Raj was not disposed for sometime to act according to the will. It is said that ultimately a settlement was arrived at through the mediation of Lalit Kishore who having stated that a heavy duty would have to be paid if probate of the will was applied for, it was arranged that the provisions of the will should be given effect to by means of *bantannamas* and *khorphosh* deeds, that they were, accordingly, drawn up and shown to the Ranis, the word "approved" was written on the draft by Krishna Prashad and signed by the Ranis, and that then the deeds were executed by the Ranis on the 5th August.

The plaintiffs' case was that they were put under restraint, had no communication with outsiders, that they were in a helpless condition, and had no independent advice in the matter. So far as the story that they were under restraint is concerned, it has no foundation. As stated above, at the time of the "Tika Pugree" of the defendant, their relations both male and female were invited and attended it. It is true that they were related to Pran Krishna, Krishna Prasad and Jagananda also, who were siding with the defendant. But there is no doubt that the Ranis had ample opportunity of communication with their relations and were in constant touch with them. There are numerous entries in the account books showing that the relations male and female of the three plaintiffs were constantly visiting the Jheria Rajbati after Raja Durga Prasad's death as before, and receiving *bidai* (parting

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presents) and sometimes pecuniary help from the defendant and were on friendly terms with him. Some of them stayed on for a long time even after the installation ceremony was over and received *bidai*. The brother of the second Rani was a constant visitor and the account books show that he had a plentiful supply of Ganja ; and that relations, servants and even ladies of their father's houses were frequently coming to Jheria and getting *bidai*. The plaintiff No. 2 went to her father's house in October 1916 and returned in August 1917. Reserved accommodation by train was provided for her by the defendant. Plaintiff No. 1 went to her father's house in June 1917 and returned in July. When the defendant was married in Falgoon 1323, the Thakurs of Pahardaha, Nanyad and Nala (the relations of three Ranis) and the mother of plaintiff No. 3 came to Jheria. All these go to show that the Ranis since the death of Raja Durga Prasad up to the institution of the suit had communication and were in touch with their relations. The plaintiff No. 1 in her evidence set up an absurd story that they were not aware of the "*Tika Pugree*" and that she thought throughout that she was on the *Gadi*—a story which has been rightly rejected by the Court below.

It is contended that the Ranis did not raise any objection to the succession of the defendant to the *Gadi* or the mutation of his name, because they were fully conscious that the defendant was joint with Raja Durga Prasad and was his successor. But what was the position of affairs then? Mr. Smith, the Manager of the estate, says he ignored the Ranis. Lalit Kishore the pleader of the estate, according to Mr. Luby was "supporting the candidature of Babu Siva Prosad", Kirti Bakshi, the Dewan, Kedar Banerji, the Private Secretary and all the other officers of the estate were supporting him. Mr. Luby, the Sub-Divisional Officer left all the valuables and the three unopened safes in the custody of Mr. Smith, and the *amlas*, including Mr. Smith went on spending the cash in the Treasury on behalf of the defendant. The defendant had control of the papers and account books in the record-room. It was widely circulated that the Raja had left a will bequeathing the estate to Siva Prosad. Rani Chatura Kumari says she heard, and all were saying, that the Raja had bequeathed all the properties to Siva Prosad. Defendant's witness Raja Sham Lal of Jamtara who attended the *Sradh* of Raja Durga Prasad says that he heard that the Raja had left a will in favour of Siva Prosad. If every one knew that Siva Prosad would get the estate under the will, the question of jointness or separation would not be raised by anyone.

It is true the plaintiff No. 1 in her deposition says that when they (herself and the other Ranis) signed the drafts of the *bantan-nama* and *khorposh* deeds they knew that the Raja had not made any will at all, and that although Lalit said that the Deputy Commissioner had made Siva Prosad *malik*, they did not believe that statement as the Raja did not make a will. These statements evidently were made with a view to deny the genuineness of the will. But Kirti Bakshi informed them of the will a day or two after the death of the Raja, and, as stated above, everybody said that there was a will, and there is no doubt that the Ranis were influenced by it in acting as they did at that time.

The installation of the defendant on the *Gadi* took place on the 19th March 1916, and the application for mutation of names in the Collectorate was made on the 31st March 1916, while Mr. Smith was Manager or supposed to be Manager under the Court of Wards. No objection being raised his name was ordered to be registered on the 1st June, 1916.

The plaintiffs contend that the Court of Wards took over possession of the estate under Mr. Crawford's order, dated the 7th March, and that the order for mutation was obtained while Mr. Smith was in possession on behalf of the Court of Wards. There is no doubt that under the orders of Mr. Crawford under section 29 of the Court of Wards Act Mr. Smith was placed in charge of valuables by Mr. Luby, but it does not appear that the Court of Wards actually took over possession of the estate. Certain paragraphs appeared in two newspapers, "Express" and "Manohum", to the effect that the estate had been made over to the defendant. The Deputy Commissioner Mr. Crawford called upon Mr. Luby to explain, and the latter stated that he never made over possession to the defendant, but entrusted the property to Mr. Smith, the Manager appointed by the Court of Wards and that Lalit Kishore was responsible for the paragraphs in the newspapers. Lalit Kishore denies that he had any hand in the matter and the Court below points out that there were certain statements which could not have emanated from him. But although the Court of Wards did not take actual possession of the estate, Mr. Smith admits that there was no collection of rents during this time though a few entries in the *rokars* showing realisation of rents from the *zemindary* during this period were shown to us, and we were told that there is at least one entry of realisation of royalty (not printed) The defendant, however, secured some letters from the owners of coal mines under the estate admitting the defendant as the Raja in

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possession and got mutation of his name in the Collectorate on the basis of possession. The Court of Wards does not appear to have taken any steps in the matter. It seems that the general impression was that the Court of Wards was in possession, the defendant took advantage of it and got mutation of his name. There is no evidence the the plaintiffs had any information about the Mutation case. But even if they had, we do not think it would have made any difference.

Mr. Smith admits that the safes were not opened till the Mutation case was over. The plaintiffs alleged that there were 8 safes. The defendant admitted that there were five. Only one safe, containing Rs. 96700 odd, was opened in the presence of Mr. Luby, the other safes, as stated above, were not opened, but were sealed and left in the custody of Mr. Smith. All the safes were not shown to Mr. Luby. But although the other safes were supposed to be sealed and in the custody of Mr. Smith, he admits that the defendant was spending money. He says that the *Sradh* expenses of Raja Durga Prasad (and the "Tika Pugree" expenses) were met from the cash in hand under the order of the defendant. All these would no doubt create an impression that the Government was supporting the defendant. The defendant then was the absolute master of the situation. In those circumstances we do not think that any person, far less ignorant purdanashin ladies like the Ranis, would have ventured to raise any claim to the Raj or even to the self-acquisitions. And how could any person venture to raise any claim? Raja Durga Prasad had treated Janaki Prasad, and Siva Prasad also, as members of his family. The papers upon which the plaintiffs rely to show separation, dating so far back as 1837, could not have been collected at the time. The documents for the defendant with all his resources, were being collected, according to Lalit Kishore, even when the written statement was being drafted. The questions of succession and self-acquisition involve many difficult questions of law and fact which have been argued before us by eminent counsel on both sides for over 3 months. How was it possible for the Ranis to set up any claim then to the succession or even to the self acquisitions, specially when everybody said that there was a will bequeathing the estate to the defendant? That explains why there was no opposition to the "Tika Pugree" of the defendant by the Ranis or their relations or by the Rajas and zemindars who assembled on the occasion of "Tika Pugree." The plaintiffs made a faint attempt to show that some objection was raised by the Raja of Tundi but the story has been rightly rejected by the Court below as false. In the then

state of things, no objection could have been raised to the succession of the defendant, and it seems that it was only after Kedar Banerji, one of the officers of the estate turned hostile to the defendant that there was any idea of setting up a claim to the Raj or to the self-acquisitions. It appears that the plaintiff No. 1 borrowed money from the defendant and all the Ranis paid to him the rents of the *mokarari* tenures which they got from Raja Durga Prasad, which could be only on the footing that the defendant had succeeded to the Raj.

There is, however, no question of estoppel, and the issue on the point was given up by the defendant in the Court below. The attitude of the Ranis is explained by the circumstances referred to above, and we do not attach any weight to the contention based upon the fact that the Ranis did not set up any claim before the suit was instituted.

Succession.

The principles relating to the succession to impartible estates were laid down in the *Shivaganga case*, (1) the leading case on the point. In that case the zemindary was conferred by the Government upon one Gowery Vallaba Taver after the death of the widow of the last holder without issue, the estate having escheated to the Government. Oya Taver the elder brother of Gowery Vallaba lived at a different place Padamatoor. Upon the death of Gowery Vallaba suits were instituted by his widows and daughters against the son of Oya Taver who had obtained possession of the estate. Their Lordships after stating that the zemindary was admitted to be in the nature of a principality—impartible and capable of enjoyment by only one member of the family at a time, and that the rule of succession to it was admitted to be that of the general Hindu Law prevalent in that part of India with “such qualifications only as flow from the impartible character of the subject” held as follows:—

(I) If the zemindar at the time of his death and his nephews were members of an undivided Hindu family and the zemindary though impartible was part of the common family property one of the nephews was entitled to succeed to it on the death of his uncle.

(II) If the zemindar at the time of his death was separate in estate from his brother's family, the zemindary would pass to his widows and failing his widows to a daughter or her descendant, preferably to the nephews, following the course of succession which the law prescribes for separate estate.

(1) (1863) 9 M. L. A. 539; 2 W. R. P. C. 31.

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(III) If the zemindar was generally undivided in estate with his brother's family, but the zemindary of Shivaganga was his self-acquired and separate property it was descendible like his separate estate to his widows and daughters and their issue preferably to his nephews though the latter as coparceners would be entitled to his share in the undivided property.

(IV) In this view (that is in the last case) the question whether the family were undivided or divided becomes immaterial. The material question of fact would be whether the zemindary was to be treated as self-acquired separate property or as part of the common family stock.

(V) The law of succession follows the nature of the property, and of the interest in it.

The rule that property which is joint will follow one, and property which is self-acquired or separate will follow another course of succession, laid down in the above case is well established, and has been followed in other cases, for instance See *Chowdhry Chintamun's case* (1). This is the rule applying both to partible and impartible property under the Mitakshara Law. There is no difficulty therefore where the property is self-acquired.

The question whether succession to *ancestral* impartible estate is governed by the principle of survivorship was considered in the case of *Baijnath Prasad v. Tej Bali Singh* (2) where Lord Dunedin exhaustively reviewed the authorities on the point. It is therefore unnecessary to discuss them in connection with the question of succession. With regard to the decisions before the case of *Sartaj Kuari* (3) his Lordship came to the following conclusion "up to this point with the single exception of the *Tipperah case* (4) which as stated was not under the Mitakshara Law, the law is all one way and seem to affirm these propositions (I) the fact that a Raj is impartible does not make it separate or self-acquired property: (II) a Raj, though impartible may in fact be self-acquired or it may be family property of a joint undivided family: (III) if it is the latter, succession will be regulated according to the rule, which obtains in an undivided joint family, so far as the selection of the person entitled to succeed is concerned i.e. that the person will be designated by survivorship, although then, according to the custom

(1) (1875) L. R. 2 I. A. 263 (271).

(2) (1921) L. R. 48 I. A. 195; I. L. R. 43 All. 228; 33 C. L. J. 388.

(3) (1887-88) L. R. 15 I. A. 51; I. L. R. 10 All. 272.

(4) (1869) 12 M. I. A. 523; 12 W. R. P. C. 21; 3 B. L. R. P. C. 13.

of impartibility he will hold the Raj without the others sharing it."

Then came the case of *Sartaj Kuari* (1) "which introduces a different line of thought." The question in that case was whether the holder of an impartible Raj could alienate without necessity. The High Court at Allahabad held that he could not. The learned Judges said "It must be conceded that the complete rights of ordinary coparcenership in the other members of the family to the extent of joint enjoyment and the capacity to demand partition, is merged in or perhaps to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant ownership." The Judicial Committee reversed that decision. Sir Richard Couch observed "Though an impartible estate may be for some purposes spoken of as joint family property, the coparcenership in it which under the Mitakshara Law is created by birth does not exist"....."the reason for restraint upon alienation under the Law of Mitakshara is inconsistent with the custom of impartibility and succession according to primogeniture"..... "The property in the paternal or ancestral estate acquired by birth under the Mitakshara Law, is in their Lordships' opinion, so connected with the right to a partition, that it does not exist where there is no right to it.....By the custom or usage the eldest son succeeds to the whole estate on the death of the father, as he would if the property were held in severalty. It is difficult to reconcile this mode of succession with the rights of a joint family and to hold that there is joint ownership which is a restraint upon alienation."

The decision in *Sartaj Kuari's case* (1) was followed in the first *Pittapur case* (2) which related to the case of an alienation of an impartible estate by will. The learned Advocate-General challenged the correctness of these two decisions, and contended that the holder of an impartible estate has no power of alienation at his will. But the decisions are binding upon us, and the question is no longer *res integra* as was pointed out in the *Dhalbhum case* (3) which is now pending before the Judicial Committee. The actual point decided in those two cases does not arise in the present.

The principle of the decisions in *Sartaj Kuari's case* (1) and the

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(1) (1887-88) L. R. 15 I. A. 51; I. L. R. 10 All. 272.

(2)* (1898) L. R. 26 I. A. 83; I. L. R. 22 Mad. 383.

(3) (1924) 40 C. L. J. 331 (339).

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Pittapur case (1) was sought to be applied to the case of *succession* in *Baijnath's case* (2). Lord Dunedin pointed out that Sir Richard Couch in *Sartaj Kuari's case* (3) did not intend that his judgment should have any such effect, and that "what was decided was that in an impartible Raj there was no restriction on the power of alienation by the member of the family who was on the *Gadi* and was in possession, in respect that there was no such right of co-ownership in the other members as to give them a title to prevent such alienation. The right of the other members that was being considered was a presently existing right. The chance which each member might have of a succession emerging in his favour was obviously outside the sphere of enquiry." The conclusion arrived at was "Their Lordships are therefore of opinion that their zemindary being the ancestral property of the joint family though impartible, the successor falls to be designated according to the ordinary rule of the Mitakshara Law".

It is contended on behalf of the plaintiffs that Lord Dunedin merely said that the successor falls to be designated by survivorship or "judged by survivorship" which goes to show that the principle of survivorship is to be resorted to only for the purpose of selecting the successor, and not that there is a right of survivorship. It is urged that in an impartible estate the right of survivorship of the junior member is only a notional one. It is difficult to reconcile the two principles viz, non-existence of coparcenary and the right of survivorship. But as pointed out in a recent Madras case, however unreal such right be for the purposes of actual ownership of the estate itself and preventing alienation, it is still a real right and gives a right of succession by survivorship. The successor is to be selected from a class each of whom must have a right of survivorship. Then the observations throughout the judgment in *Baijnath's case* (2) were directed to show that the decisions both before and after *Sartaj Kuari's case* (3) established the rule of succession by survivorship, and that the cases of *Sartaj Kuari* (3) and the *Pittapur case* (1) did not touch that question. His Lordship in reviewing the cases after *Sartaj Kuari* (3) pointed out that in *Jogendra Bhupati's case* (4) Sir Richard Couch himself stated that in "considering who is to succeed on the death of the Raja, the rules which govern the

(1) (1898) L. R. 26 I. A. 83 ; I. L. R. 22 Mad. 383.

(2) (1921) L. R. 48 I. A. 195 ; I. L. R. 43 All 228 ; 33 C. L. J. 388.

(3) (1887-88) L. R. 15 I. A. 51 ; I. L. R. 10 All. 272.

(4) (1890) L. R. 17 I. A. 128 ; I. L. R. 18 Calc. 151.

succession to a partible estate are to be looked at, and therefore the question in the case is what would be the right of succession supposing instead of being an impartible estate it were a partible one" and observed "This passage is absolutely conclusive as to Sir Richard Couch's view. The other parties to the judgment were Lord Watson and Sir Barnes Peacock." His Lordship referred to the observation of Lord Davey in *Raja Viravara v. Raja Viravara* (1) "That even if impartible, it may still be part of the common family property.....and the real question is whether it ceased to be part of the joint property of the family", to the observation of Lord Davey upon a question which incidentally arose in connection with the state of affairs in the old family of the Bettiah Raj in the first Bettiah case: *Ram Nundun v. Janki Koer* (2) that "Raj Kissen was joint in estate with his brother and therefore was entitled to succeed him in the family property by survivorship", to a passage in *Kulchi Kalujana v. Kachi Yuva* (3) that "It was settled in accordance with a ruling of this Board that when impartible property passes by survivorship.....", and to the fact that Lord Hobhouse in *Muttuwa daganadha v. Periasami* (4) had approved of the decision of Muttusami Ayar J. who held that survivorship governed the principle of succession. Reference was also made to the observations of Lord Collins in *Parbati v. Chandarpal* (5) viz. "The first principle is that a rule of decision in regard to succession to impartible property is to be found in the Mitakshara Law applicable to partible property, subject to such modifications as naturally flow from the character of the property as an impartible estate. The second principle is that the only modification which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu law.....We have first to ascertain the class, and we have next to select the single heir, applying the special rule." And he then went on to cite Sir Richard Couch in the passage already cited in *Jogendra Bhupati's case* (6).

Lord Dunedin then observed "It will be apparent from this long line of authorities that there are under the Mitakshara

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(1) (1897) L. R. 24 I. A. 118; I. L. R. 20 Mad. 256.

(2) (1902) L. R. 29 I. A. 178; I. L. R. 29 Calc. 828.

(3) (1905) L. R. 32 I. A. 261; I. L. R. 28 Mad. 508; 2 C. L. J. 231.

(4) (1896) L. R. 23 I. A. 128; I. L. R. 19 Mad. 451.

(5) (1909) L. R. 36 I. A. 125; I. L. R. 31 All. 457; 10 C. L. J. 216.

(6) (1890) L. R. 17 I. A. 128 (131); I. L. R. 18 Calc. 151.

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only two possible lines of devolution and that the only test to be applied is, was there community or was there separation?" Reading the judgment as a whole it appears that in their Lordships' view, the rule of survivorship applies to succession in ancestral impartible estates.

We have found that Nanda Kishore's branch was not completely separated from the Raj. The defendant, therefore, was entitled to succeed to the Jheria impartible estate.

We have referred to the *bantannamas* and *khorposh* deeds executed by the plaintiffs. They are relied upon by the defendant as binding upon the plaintiffs.

The drafts of the *bantannama* and *khorposh* deeds are said to have been explained to the Ranis by Lalit Kishore on the 29th July and left with them, and were returned to him on the morning of the 30th July. Lalit Kishore says "on the 5th August 1916, I read the documents and in some parts I might have explained the documents. One maid servant of the Ranis explained what I said to the Ranis. Then the documents were presented after the execution to the Sub-Registrar." Now the plaintiff No. 1 signs her name, and gave her deposition in Hindi. She seems not to know, or at the best, has only an imperfect knowledge of Bengali, Lalit Kishore "might have" explained the documents in "some parts" and that again was explained by a maid servant to the Ranis.

According to Mr. Smith, "Lalit read them out and Pran Krishna interpreted and acted as go-between". This, however, is not what Lalit Kishore said, nor is it the defendant's case. Kali Pada Roy does not say anything about explaining the documents. Kirti Bakshi, who says that they were read over, does not say anything about the explanation. Taking the evidence of Lalit Kishore as giving the correct version, we do not think that there was sufficient explanation of the documents to *pardana-shin* ladies. But apart from that, we think that the Ranis had no independent advice in the matter. As stated above, Mr. Luby says that Lalit Kishore was supporting the "candidature of Babu Siva Prosad Singh." The conduct of Lalit Kishore has been severely criticised by Mr. Sirkar for the plaintiffs, and the Advocate-General has sought to defend it. It is unnecessary to discuss the matter. He was supporting the defendant, he evidently was convinced that the plaintiffs had not only no claim to the Raj but no claim also with regard to the self-acquisitions (jewellery, cash, etc) apart from the will, and he thought of giving effect to the provisions of the will by means of *bantannamas* and *khorposh*

deeds. He would naturally look at the matter according to the opinion he had formed about the rights of the parties and from the point of view of his client. At that time the documents upon which the plaintiffs rely had not been collected. There are many debatable and difficult questions of law and fact with regard to succession and self-acquisition and there was no one to place the case from the plaintiffs' point of view before Lalit Kishore. In these circumstances, we think that any advice given by him cannot be said to be independent advice.

The *bantannama* contained an important recital that the defendant lived "jointly and in commensality with the deceased Raja", and it is contended by the plaintiffs that the main object of the *bantannamas* was to get an admission of the Ranis about the jointness, because there was no necessity for having such a recital in the deed which, according to Lalit Kishore, was executed for the purpose of avoiding probate duty. There is no doubt that an admission about the jointness of the defendant was taken from the Ranis, but, after all, the statement so far as it goes is true to some extent, because whether Nanda Kishore was or was not separate from the Raj, the defendant Siva Prosad was living in commensality with Raja Durga Prasad at the time of his death though according to the plaintiffs as a "charity boy". However that may be, we entirely agree with the finding of the Court below that the deeds were not properly explained, that the plaintiffs had no independent advice in the matter, and that they are not binding upon the plaintiffs.

It is pointed out that Exhibit H (6), the draft *bantannama*, which is said to have been explained by Lalit Kishore to the Ranis on the 29th July stated "what I have got has been mentioned in the Schedule 2 below", but, as a matter of fact, the schedule did not come into existence before the 5th August.

The division of the jewellery is said to have taken place on the morning of the 5th August. Exhibit H (6) (b) (the first page) contained a list of the jewels as in the will (except the 24th item), and was in the handwriting of Kedar Bauerji. Lalit Kishore says "I believe it was made over to me for the first time on the 5th August." Of course, the draft could not have mentioned how the jewellery was divided because the division is said to have taken place on the 5th August, and if, as a matter of fact, the Ranis actually got the jewellery before the execution of the deed they knew what the jewellery was of which they were getting the 10 as share referred to in the draft. The question of jewellery will be dealt with later.

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Neither Lalit Kishore nor any other witness says that the Ranis had any information as to how much money was in the till or in the iron safe. As already stated, only one Safe containing Rs. 96000—was opened in the presence of Mr. Luby, but although the other safes were kept under seal, the Raj officers went on spending money under the orders of the defendant. The expenses of the *Sradh* of Raja Durga Prasad and "*Tika Pugree*" were met from the money in the Treasury. In the *bantannama* only Rs. 96000 was shown as the cash. The other cash out of which the defendant was spending money was not mentioned in the *bantannama* and the plaintiffs had no knowledge of the amount in cash or what became of the money. So the Ranis when they signed in approval of the draft had no idea of what they were getting under the deed. In any case, they put down their names when the schedules had not come into existence. According to the plaintiffs, the deed was not explained nor was anything done on the 29th July and reference is made to paragraph 25 of the written statement where it was stated that Lalit Kishore had "no talk with the plaintiffs at any time before the partition of the moveables according to the directions in the will", and that whatever was done was on 5th August just before execution. Reference is also made to paragraph 30 of the affidavit of the defendant in the Receiver matter where it was stated that the drafts of the *bantannamas* and *khorposh* deeds were explained to the Ranis on the 5th August (the learned Advocate-General said—deeds of the 5th August, but the original says that it was on the 5th August that they were explained). The explanation given by Lalit Kishore is that he had no talk with the Ranis before the partition, meaning thereby the whole transaction and not merely the date on which the division of the jewellery actually took place. We think that his explanation should be accepted because the plaintiff No. 1 admitted that Lalit Kishore had spoken to them a few days before the execution of the deeds. However that may be, it is not clear that he explained the drafts on the 29th July because if he had, there would be no necessity for the explanation of the deeds "in parts" (interpreted) by a maid servant on the 5th August. In any case, what he did was to explain portions of the deed which again were explained to the Ranis by a maid servant.

By the *khorposh* deeds dated the 5th August 1916 the maintenance of each Rani was fixed at Rs. 300 per month (Rs. 3600 a year) and the same was charged upon the zemindary of Jheria. The plaintiffs said that they did not get the *khorposh* deeds, and the defendant produced certified copies thereof from the Registra-

tion Office. The plaintiffs' case was that they were not aware of the *khorphosh* deeds and never received money on the basis of the deeds, but received money for their private expense in the same way as they did in their husband's life-time under the impression that they were entitled to receive such money as before (See application for appointment of Receiver, paragraph 40).*

It appears that during the life-time of Raja Durga Prasad, the Ranis used to get a certain sum each as pocket money. (Plaintiff No. 1 Rs. 100, Plaintiff No. 2 Rs. 90 and plaintiff No. 3 Rs. 75 per month). By the *khorphosh* deeds the maintenance allowance of each Rani was fixed at Rs. 300 per month from the death of Raja Durga Prasad. The first payment was made on the 12th August, and the entry dated the 16th October 1916 shows that arrears from 24th Falgoun to 19th Sraban 1323 (i. e., from the death of Raja Durga Prasad up to the 4th August 1916) were paid at the old rate, and from the 29th Sraban 1323 (i. e., the date of the *khorphosh* deed) up to the 31st Bhadro at the rate provided for in the deed. It is contended that the Ranis used to get much smaller sums before and each at a different rate, whereas since the execution of the *khorphosh* deeds they received much larger amounts (all the Ranis getting equal amounts), that they signed the Chutkas—one at the old rate, and the other at a different rate. There were subsequent payments at the new rates up to a few months before the institution of the suit, and the Chutkas were signed by the Ranis. An explanation was attempted on behalf of the plaintiffs viz., that they were receiving large sums on account of rent of their *mokarari mouzahs*, which was being collected for them by the defendant under *Am-muktearnama hs* and for which receipts were being obtained from them, he in his turn having appointed Behari Lal as Am-muktear to collect rents, besides their pocket money and that there was nothing to show that the receipts were explained to the Ranis or that the Ranis understood that the payments were not on account of *mokarari* collections. But two of the Ranis at any rate know Bengali—there were separate receipts one at the old rates (unequal amounts), the other receipt being at the new rates under which all the Ranis got equal amounts. Under the circumstances, we are unable to accept the explanation as a satisfactory one. We think that in the then circumstances, the Ranis had no option but to submit to what the defendant chose to give them. But they had no independent advice in the matter and the observations we have made with respect to the *bantannama* apply to the *khorphosh* deeds also.

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It is said that the Ranis and the defendant were on friendly terms up to a few days before the institution of the suit. But the defendant in his letter to the Jheria Water Board dated the 19th October 1906 stated "there has not been a good feeling between your petitioner and the widows of the Raja and it is therefore necessary for your petitioner to build his house elsewhere". In the *mokarari* patta dated 26th August 1906 executed by the defendant in favour of Lalit Kishore, it was stated that the latter had "settled all the disputes which were likely to arise after his (Raja Durga Prasad's) death". It is said that it referred to disputes with Pran Krishna, but Kirti Bakshi says that Pran Krishna did not raise any question of succeeding to the estate, and in the suit brought by the defendant against the Bank, Pran Krishna gave evidence on his behalf and fully supported the defendant's case with respect to jointness and succession. The settlement of disputes must have been with reference to the Ranis. It cannot be said, therefore, that the defendant and the Ranis were on friendly terms. All that can be said is that the defendant was paying their *khorposh* allowance and other expenses and also their travelling and lodging expenses and the *Bidai* (parting presents) of their relations who came rather frequently to Jheria, and the Ranis had not then got any independent advice and consequently had not taken any active steps to assert their rights. Mr. Smith says that at least 2 or 3 months before the suit he knew that it was coming on, so the fact that the Ranis' relations were coming and getting *Bidai* upto even a few days before the suit is of no importance.

It is contended on behalf of the defendant that the question of independent advice has to be considered with reference to the state of things which existed at the time the deeds were executed. But what was the position then? Every one connected with the Raj was supporting the defendant, the Court of Wards not excepted. The plaintiffs were helpless. It was all the more necessary then for the Ranis to have independent advice as to their rights under the law to the Raj, at any rate to the self-acquisitions and also as to their right to maintenance. If they were entitled to the self-acquisitions (which are now claimed to the extent of about thirty lacs), were the Ranis properly advised in taking a 10 annas share of some of the self-acquired properties of their husband and a maintenance of Rs. 300 per month each? We do not think they were, and we hold that the *bantannamas* and *khorposh* deeds are not binding upon them.

The *bantannamas* and *khorposh* deeds were sent to the Bank of

Bengal for withdrawing the moneys kept as fixed deposits in the Bank. But the Bank would not pay the money as no Probate or Letters of Administration had been obtained, and, accordingly, a friendly suit was instituted by the defendant against the Bank. The Ranis were made pro forma defendants. The plaint referred to the arrangement between Shiva Prosad and Ranis regarding the division of the cash (including the monies in the Bank) jewellery etc. No details about the division were given in the plaint but copies of the *bantanamas* were annexed to the plaint. It was stated, however, that in the circumstances "the plaintiff has been advised that he is absolutely entitled (inter alia) to the monies standing to the credit of the late Raja Durga Prasad in the defendant Bank".

An *Am-mukhtearnamah* was obtained by the defendant from the Ranis on the 13th April 1917. It was stated that various suits and proceedings might arise with regard to the properties of the Ranis, that Shiva Prosad had agreed to pay a ten annas share of the monies in deposit in the Bank of Bengal and it was "necessary that efforts should be made to draw out the money at an early date by appearing in that suit". The *Am-mukhtear* was authorised to file petitions by signing the names of the Ranis for withdrawing any money paid by any tenant, debtor or borrower (of the Ranis) into any Court Office or Treasury. The defendant was also authorised to appoint *am-mukhtears* with similar powers.

Before the *Am-mukhtearnamah* was executed, Siva Prosad took out summons upon the Ranis and there was the usual return of service of summons in the suit against the Bank. It is said that the peon and Behari Lal, the identifier, called out the names of the Ranis, two maid servants came out and took the summons and returned them saying that the Ranis would not accept them and thereupon the summons was stuck up on the door of the Ranis' mahal. The plaintiff No. 1 denies receipt of summons or any knowledge of the suit. The Court below has found that the plaintiffs had no knowledge of the suit and we agree with that finding. It is to be observed that before the summons was served on the 22nd March 1917, stamps for the *Am-mukhtearnamas* were purchased on the 26th February. As found above, the summons was not served, and although the defendant obtained the *Am-mukhtearnamas*, no appearance was entered on their behalf. There is no evidence to show that the *Am-mukhtearnama* was explained to the plaintiffs or that the defendant informed the plaintiffs of the suit or what happened to it. The *Am-mukhtearnama* might have been taken from the Ranis on the representation that

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it was necessary for managing their *mokarari* properties. Kirti Bakshi says that the Ranis sent word to him asking him whether they should give the *Am-mukhtearnama* to the defendant and he advised them to do so. But execution of *Am-mukhtearnamas* by Purdanashin ladies for management of their properties is not an unusual thing. The Ranis executed *Am-mukhtearnama* in favour of their husband Raja Durga Prasad, and the execution of such a document would not excite any suspicion nor fix them with knowledge of all its contents.

It is contended on behalf of the defendant that nothing turns upon the *Am-mukhtearnama*, and that in any case the plaintiffs cannot set up the invalidity of the document, and at the same time hold the defendant as their agent. It is said that it is not necessary for the defendant to rely upon it. No evidence was adduced that it was explained to the ladies and the defendant did not rely upon it. If the plaintiffs want to treat it as an effective document they must take the consequences. It recites the *Bantannama*, the arrangement arrived at between the parties and the Bank suit itself and if it is an effective document, the Ranis are fixed with the knowledge of all those matters. On the other hand, if it is not a valid document, the plaintiffs cannot hold the defendant as their agent. They cannot treat it as binding for one purpose, and not binding for other purposes: they cannot approbate and reprobate. But the execution of the document was admitted in the plaint, though it was alleged not to be binding, because, no one explained to them their "real drift scope and effect". It is true the plaintiffs repudiate it altogether, but, as a matter of fact, the defendant as an *Am-mukhtear* of the Ranis did collect rents of their *mokarari* properties through Behari Lal, an agent appointed by him under the powers conferred upon him. As a general Power of Attorney, it was acted upon by the defendant. The defendant in paragraph 40 of his written statement expressly admits that he was acting as the *Am-mukhtear* of the Ranis. It is not binding upon the Ranis with reference to the suit against the Bank, as there is no evidence that their attention was pointedly drawn to it, or that the scope and effect of it was explained to them. The document may therefore be valid as a general Power of Attorney with regard to the general management of the estate of the Ranis, and yet not be binding so far as the recitals contained in it are concerned nor fix them with knowledge thereof. The argument on behalf of the defendant particularly is that if the *Am-mukhtearnama* is not a binding document, it should be ignored for all purposes. But what was the

position with reference to the suit against the Bank? Siva Prosad brings a suit against the Bank, refers to the *bantannama* which he knew or should have known was not binding upon the Ranis, does not get the summons served upon them, takes a general power from them, and acts upon it so far as the general management of the Ranis' estate is concerned, Judges for himself whether an independent adviser should be consulted, asks the High Court to act upon the return of service of summons upon the Ranis without disclosing the fact that he is constituted attorney and holds a general Power of Attorney under which he had power and it was his duty to protect the interest of the Ranis in the suit against the Bank, and gets a decree for the entire amount against the Bank (though even according to the *bantannama*, the Ranis are to get a ten annas share thereof) and now pleads that the decree is binding upon the Ranis because the Ranis now repudiate the general power. In these circumstances, the subsequent repudiation of the power by the Ranis did not absolve the defendant from doing his duty as their agent. Mere non-service of summons in ordinary cases may not be sufficient to constitute fraud, but the non-service in the present case taken together with the circumstances stated above, we think, constitutes fraud.

It is contended on behalf of the defendant that it is a new ground of fraud based upon the *Am-mukhteernama* which is set up in this Court, that it was not only not alleged in the pleadings but the plaintiffs repudiated the *Am-mukhteernama*. But the plaintiffs challenged the decree as fraudulent, and although it is not open to the plaintiffs to set up a new ground of fraud, they are entitled to show upon the facts admitted in the pleadings that there was fraud. As stated above, the defendant in the 40th paragraph of his written statement expressly set up the *Am-mukhteernama* and admitted that he was acting as the *Am-mukhtear* of the Ranis. We do not see why the plaintiffs should not be allowed to use that admission along with other circumstances as showing that the decree was fraudulent.

It is contended that there was nothing wrong in defendant's taking the *Am-mukhteernama*, because, one of the objects was to use it in the Bank suit to expedite its hearing which was stated in the document itself; and if effect was to be given to the *Bantannama* there was no harm in the defendant's arming himself with authority to appear for the Ranis, but that he did not appear because the Bank was not prepared to recognise him by virtue of the *bantannama* or even the order in Mutation Case, and the position would

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not be improved by defendant's appearing for the Ranis, as the Bank would not be satisfied without a decree of the Court in the presence of all parties, and it was, therefore, that steps were taken for service of summons upon the Ranis. But if that was so, why was the *Am-mukhtearnama* taken so far as the Bank suit was concerned? Apart from that, there might have been some force in the argument, had the summons been properly served upon the Ranis. But he neither got the summons properly served nor took steps to have the Ranis represented in the suit. We do not think, therefore, that the defendant's contention has any force.

The High Court before passing a decree must have found that there was proper service of summons, but the Court would not be in a position to know whether the peon's report and the identifier's affidavit were true or false, and would act upon them. It is the case of the defendant that the suit against the Bank was a friendly one, and the Ranis were as anxious, if not more, to have the suit decreed. If so, it is difficult to see why the Ranis should refuse to accept the summons. If the Ranis had fully understood the *bantanama* and the *Am-mukhtearnama* and had agreed to the arrangement set up by the defendant, there is no reason why they should refuse to accept summons in the suit brought for the very purpose of carrying out the arrangement. It is suggested that many people refuse to accept summons. But the Ranis, according to the defendant, were anxious to get the money in the Bank. Apart from that, if the Ranis had agreed to the arrangement, would not Siva Prosad at once go to the Ranis, who were residing in the Rajbati and ask them to accept service of summons, and tell them that unless they did so, there would be delay in getting the money from the Bank? For all these reasons, we are of opinion that the Ranis had no knowledge of the suit and the decree was fraudulent.

It is contended that even if the decree was obtained by fraud, it is binding upon the plaintiffs, as they had taken no steps to have it set aside in the regular way. But if the decree is fraudulent, it is open to the plaintiffs under section 44 of the Evidence Act to show that it was obtained by fraud, and it is not necessary to set it aside. Section 44 of the Evidence Act lays down that any party to a suit or other proceedings may show that any judgment, order or decree which is relevant under sections 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. The section was construed by Maclean C. J. and Banerjee J. in the case of *Rajib*

Panda v. Lakhan Sindh Mahapatra (1), and it was held that party to a suit can show that a decree obtained by the opposite party against him in another suit was obtained by fraud, and it is not necessary for him to bring an independent suit for setting it aside. See also *Ahmedbhoy v. Vulleebhoy* (2); *Mancha Ram v. Kalidas* (3), and *Nistarini Dassi v. Nundo Lal Bose* (4), where a consent decree was treated as a nullity.

Reliance is placed on behalf of the plaintiffs on the cases of *Chitambar v. Krishnappa* (5); *Paresh Nath v. Hari Charan* (6), and *Raj Kumar Sarkel v. Raj Kumar Mali* (7).

We do not see how these cases help us in the present case. The first two cases were decided on the principle that *bona fide* auction-purchaser is not affected by any fraud in the decree if he is not a party to the fraud, and the third held that a sale cannot be set aside without setting aside a fraudulent decree, and if the plaintiff has lost his rights to attack such a decree he cannot get the sale set aside. We were also referred to the judgment of the Judicial Committee in the case of *Benode Behari Bose v. Nistarini Dassi* (8), as showing that the decree was dealt with as if it was set aside. But their Lordships did not decide whether it was necessary to set aside the decree or it could be treated as a nullity, and it does not appear that the decree was set aside.

The learned Advocate-General contended that if the view taken in *Rajib Panda's Case* (1) is accepted, the provision of article 95 of the Limitation Act would be nugatory and there would be no limitation for setting aside a decree.

No doubt there would be an anomaly, but in *Rajib Panda's case* (1), Maclean C. J. held that having regard to the plain words of the section, a party against whom a decree relevant under section 40 is proved is entitled to show that it was obtained by fraud. In the present case, however, no question of limitation under article 95 arises. The decree was passed by the High Court on the 31st August 1917 and the present suit was instituted on the 6th March 1919 which was well within three years. Then the plaintiffs prayed for a declaration that the decree was fraudulent and not binding upon them. The Court, in order to grant the relief prayed for by

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(1) (1899) I. L. R. 27 Calc. 11. (2) (1882) I. L. R. 6 Bom. 703 (715).

(3) (1894) I. L. R. 19 Bom. 821 (826).

(4) (1902) I. L. R. 30 Calc. 369 (382-383).

(5) (1902) I. L. R. 26 Bom. 543 (547).

(6) (1911) I. L. R. 38 Calc. 622 (627). (7) (1915) 20 C. W. N. 659.

(8) (1905) I. L. R. 33 Calc. 180 (191); 2 C. L. J. 189.

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the plaintiffs has to see whether the decree was obtained by fraud, and the effect of the declaration prayed for would be to set aside the decree. The enquiry would be the same if a formal prayer were added for setting aside the decree, when there is no question of limitation, and the utmost that can be said is that formal amendment by adding such a prayer might be necessary.

It was contended on behalf of the plaintiffs that the judgment of the High Court on its Original Side is not *res judicata* as the Court was not competent to decide the present suit as it relates to properties which are outside the local limits of the Ordinary Original Jurisdiction of the High Court and reference was made to the case of *Shibo Raut v. Baban Raut* (1), where it was pointed out that in order to establish the plea of *res judicata*, it has to be shown that the Court of concurrent jurisdiction which decided the former suit was a Court of jurisdiction competent to try the subsequent suit. It is contended on behalf of the defendant that the principle applies only to cases relating to the pecuniary jurisdiction of the Court or to Courts such as the Small Cause Court, and not to cases of territorial jurisdiction. It is unnecessary, however, to discuss this question as we have found that the decree is fraudulent and is not binding upon the plaintiffs.

Payment of Rs. 48000 and Rs. 64000 to the Ranis.

Under the *bantannamas* the Ranis were to get Rs. 48249-3-15. The plaintiffs denied receipt of payment of the money. The Court below found that the money was paid to the Ranis on the date of the *bantannamas* (5th August 1916). That finding has been challenged by the plaintiffs.

There is an entry in the rokar of the 5th August 1916 "The cash money in hand of the time of the late Raja Bahadur having been divided, amount paid to Raja Bahadur for payment to the Rani Saheba, of the money due for their shares as per Chutka No. 1985 Rani Prayag Kumari Rs. 16083-1-5" (and so on to each Rani) Total Rs. 48249-3-15. There is a similar entry in the Chutka No. 1985.

The defendant relies upon his register of currency notes for the number of the notes paid to him for payment to the Ranis. 26 of these notes are traced to the Benares Bank at Bhagalpur in the following manner. It appears that certain properties belonging to certain Sinhas were sold in execution of a mortgage

(1) (1908) I. L. R. 35 Calc. 353 (358); 7 C. L. J. 470.

decree of T. Lal in the Bhagalpur Court. The mortgagors raised money by executing a conveyance of the property to one Thakur Prasad, the sister's son of Rani Hem Kumari, the plaintiff No. 3 who paid the purchase money. The conveyance was executed on the 26th October 1916 and the consideration money which consisted of currency notes was paid to the decree-holder's pleader on the 30th October, and on the 31st October those notes were deposited to the account of T. Lal in the Benares Bank at Bhagalpur. The numbers of 26 of these notes correspond to the numbers of the notes in the Note Register; and the portions of the notes preserved in the Currency Office in five instances purport to bear the signature of the plaintiff No. 3.

It is admitted by the plaintiff No. 1 that the plaintiff No. 3 sent one lac of rupees from Jheria for the purchase of the property, and the defendant relies upon the entries in the Note Register and the Register of the Benares Bank for showing that the notes were paid by the defendant to the plaintiffs. It is pointed out by the plaintiffs that there are blank spaces (sometimes half or whole columns) left in the Note Register, and Mr. Smith the manager says that he had no concern with the Note Register. The defendant relies upon the fact appearing from the Note Register that notes received after cashing cheques or otherwise by the Raja were credited in the Register and debited when they were paid out, and that the 26 notes were received on three dates in 1915 and were not paid out until the 5th August (the date on which Rs. 48000 and odd are said to have been paid to the Ranis). But no one swears that the Note Register is regularly kept in the ordinary course of business. The plaintiffs point out that the plaintiff No. 3 used to sign as *Srimati* not as *Srimatya* as appears on the back of the five notes referred to above, and that the knowledge of the tehsildar who speaks to her signature is derived only from his having seen her signature on chalans. But the defendant served interrogatories with reference to these notes, and the plaintiffs said that they did not remember if they received them and the plaintiff No. 3 did not examine herself to deny her signature on the back of the notes. These facts are in favour of the defendant. On the other hand, the entries in the rokar and Chutka only show that Rs. 48000 and odd were paid to the defendant for payment to the plaintiffs, not that they were paid to the plaintiffs. Kalipada Roy, the Cashier of the defendant says that he made over to the defendant currency notes of Rs. 1000 each (for Rs. 48000) in the presence of the Sub-Registrar when he was

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registering the *bantannama*. But there is no endorsement of payment by the Sub-Registrar on the *bantannama*. The Sub-Registrar has not been called as a witness. No one speaks to the actual payment to the plaintiffs.

Mr. Smith says that Pran Krishna took the money inside the *purdah* for payment to the Ranis, but there is no evidence that they were actually paid over to them. Lalit Kishore cannot say who actually took the money to the Ranis. The defendant who got the money from the Cashier for payment to the Ranis and who swore an affidavit to his personal knowledge that Rs. 48000 was paid to the Ranis in 48 currency notes of Rs. 1000 each in his presence has not examined himself, nor examined Pran Krishna. The whole thing, therefore, rests upon the entries in the Note Register and the circumstantial evidence afforded by the identity of some of the notes in the Benares Bank. The plaintiff No. 1, however, says that sometimes small notes were changed into big notes from the Raj Treasury. The defendant's witness Mukteswar Boral admits that that was so. It is to be observed if Rs. 48000 and odd were paid to the three Ranis, the plaintiff No. 3 got only Rs. 16000 and odd in her share which could not account for currency notes for Rs. 26000 in the Bank. It is suggested however that she had her share of Rs. 64000 also and her shares in the two sums of money exceeded Rs. 26000, that, as a matter of fact, she sent one lac of rupees, and she might have taken big currency notes from the other Ranis. But these are speculations, and if it is open to speculate it may also be suggested that the plaintiff No. 3 changed small notes or cash into big notes from Pran Krishna on or after the 5th August 1916, assuming that Rs. 48000 was made over to Pran Krishna for payment to the Ranis.

Mr. Smith in his evidence says "It is usual to mention the number of the currency notes and the amount paid in silver in the deed. There was no reason to depart from the usual practice in the case of the *bantannama* (Exhibit H4). The memorandum of consideration with the numbers of the notes is not given in Exhibit H4. No particulars of the money are shown in Exhibit H4. The money was paid in the presence of the Sub-Registrar. I did not ask the Sub-Registrar to make a note of that. As a rule, the Sub-Registrar makes a note of it when the money is paid in his presence. I cannot assign any reason why that rule was departed from".

The defendant was dealing with *purdanashin* ladies; the

Registering Officer had come to the Rajbati and yet the usual practice of having a memorandum of consideration and the endorsement of payment of the money by him was not followed, and Mr. Smith cannot give any reason for not following the usual practice. Practically the only evidence of payment consists of the statement of the Cashier that he handed over the notes to the defendant for payment to the Ranis, that the latter handed them over to Pran Krishna who went inside the purdah to make them over to the Ranis, and the tracing of some of the notes to the Benares Bank.

The learned Advocate-General suggested an explanation as to why the payment of Rs. 48000 and odd was not endorsed viz. that it was not a consideration paid for the deed or for the partition, that whatever the consideration was, it was not merely Rs. 48000, it was the whole of the money of which the Raja got a portion and it was only Rs. 48000 which was paid in the presence of the Registrar, the rest being left in the Raj Treasury which could not be endorsed by the Registrar; that the document was a partition deed, each party getting something in the division, and that if Rs. 48000 is to be treated as consideration, the Bank money and jewellery were also consideration. But section 58 of the Registration Act provides that on every document admitted to registration there *shall be endorsed* certain particulars, among others (Clause C) "any payment of money or delivery of goods made in the presence of the Registering Officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution". If the payment of Rs. 48000 and odd was made, it was made *in reference* to the execution of the document, which could and should have been endorsed. So would jewellery if made over in the presence of the Registrar, as it would come under the words "delivery of goods", but not the Bank money which was not paid, being still in the Bank. The explanation suggested therefore cannot be accepted.

The fact that the Sub-Registrar was not examined by the defendant was commented upon on behalf of the plaintiffs. No doubt he would have been a good witness, and the omission to examine him is open to comment. It was also pointed out that he was granted lands on favourable terms by the defendant, but no inference can be drawn against the defendant from that fact, because if the Sub-Registrar was bribed, it would perhaps not have been difficult to get an endorsement of payment.

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The question whether the money was paid to the Ranis is no doubt a simple issue of fact and the Court below has come to a finding upon the evidence in favour of the defendant. But in arriving at the finding the learned Subordinate Judge does not appear to have taken into consideration some important facts and circumstances noted above, and has also erred in reading the evidence on the point. He observes "Defendant has examined some witnesses who say that Rs. 48249-3-9 was paid to the plaintiffs in the evening of the 5th August 1916". As stated above, Mr. Smith only said that Pran Krishna took the money inside the *purdah* for payment to the Ranis, Lalit Kishore cannot say who actually took the money to the Ranis, Kali Pada, the Cashier at first said that he made over Rs. 48000 to the defendant and did not see what became of the money, and then said that the money was paid to the Ranis by the *defendant* in his presence and in the presence of the Sub-Registrar. Kirti Bakshi merely said that the Ranis were paid Rs. 48000. But Pran Krishna, according to Mr. Smith, took the money inside the *purdah* for payment. Kirti Bakshi must have referred to that as payment to the Ranis. It is not suggested that he or Kalipada could have gone or did go inside the *purdah* to the Ranis. The Subordinate Judge does not appear to have considered these matters. We are, accordingly, unable to agree with the Court below in its finding upon this point, and unable to hold that Rs. 48000 and odd were paid to the plaintiffs.

Rs. 64000.

As already stated, it was mentioned in the *bantannamas* that instead of taking Rs. 64000 from the Ranis, the defendant would take that sum out of the amount due to the Ranis from the money found by Mr. Luby in the outer apartments, and, accordingly, the sum of Rs. 64000 was deducted. The Court below says:—"Another point in this connection is that the plaintiffs admitted in the *bantannamas* having appropriated the sum of Rs. 64000 left by Raja Durga Prasad in an iron safe in the *ander mahal*. Plaintiff No. 1 states that Raja Durga Prasad Singh had no money there, and that plaintiff No. 3 kept her money in the safe in question. Babu Lalit Kishore Mitter, Pleader, who cross-examined the plaintiff No. 1 suggested at the time that the treasurer kept Rs. 64000 in the box. Kalipada Roy, Treasurer, has not been asked any question on the point and no other Treasurer has been examined to prove it. There is no evidence to show that the plaintiffs appropriated Rs. 64000 belonging to Raja Durga Prasad Singh. I have

already found that the plaintiffs are not bound in any way by the deeds. The Ranis could not understand the nature of the documents".

It is contended that there was no question of appropriation, that but for the agreement the Ranis would have had to produce the Rs. 64000 and then take it back, and that once it is held that the Ranis received Rs. 48000 and odd, as stated in the *bantannamas*, the receipt of Rs. 64000 follows.

We have found that the payment of Rs. 48000 and odd to the Ranis on the basis of the *bantannamas* has not been satisfactorily proved. But even if it were proved it does not follow that the Ranis got Rs. 64000 unless it was proved, that Rs. 64000 had been left in the *ander mahal*. The plaintiff No. 1 stated that Raja Durga Prasad had no money in the iron safe in question. As pointed out by the Court below, it was suggested in cross-examination that the treasurer Kalipada had kept the sum in the safe, but he was not asked any question on the point, nor was any other treasurer examined to prove it. So that the existence of Rs. 64000 in the *ander mahal* rests upon the recital contained in the *bantannamas*, and we agree entirely with the Court below in finding that the plaintiffs did not appropriate the sum of Rs. 64000 and did not properly understand the documents.

Jewellery.

The Court below disbelieved the story that the 8 items of jewellery and valuables mentioned in the schedule to the *bantannamas* were made over to the plaintiffs.

The defendant's case on the point is as follows :—The division of the jewellery took place at 7 O' clock in the morning of the 5th August 1916 and as the jewellery could not be valued, the Ranis were given the choice, and they at first selected five items. The list of jewellery headed "List in the will" was in the hand-writing of Kedar Banerji and the five items selected by the Ranis were mentioned on the back of the page of Exhibit H (6) (b) in the writing of Lalit Kishore under the heading "belonging to the share of the Ranis" with a note on the margin. "The Ranis selected and took these five items. The rest belongs to the Raja." Then the Ranis selected three more which are also mentioned on the same page, and a note made "The remaining 15 items remain for the Raja" and then follows a list of the jewellery falling to the share of the Raja. The plaintiffs denied that there was any division and various grounds have been urged on behalf of the plaintiffs as to why the story of the division of the jewellery should not be accepted.

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(I) In the long cross-examination of the plaintiff No. 1 extending over several hundred pages, there was no suggestion of the division of the jewellery in the morning, nor of the Exhibit H (6) (b) being written at the time. All that was put to her was why she did not specifically claim the jewellery in paragraph 9 of the plaint, when in paragraph 12 of the plaint it was stated that there was no partition whatever in fact. On behalf of the defendant, it was said that the plaintiff No. 1 would not know whether Lalit Kishore was writing anything on Exhibit H (6) (b), and that the division of the jewellery having been set out in paragraph 54 (c) of the defendant's petition in the Receiver matter as early as the 8th December 1919, it makes no difference whether it is or is not put to the plaintiffs in cross-examination, and that the plaintiffs having denied receipt of the jewellery in answer to the interrogatories, it was no good putting it to her. But although the Ranis might not have been seen or known that Lalit Kishore was writing on Exhibit H (6) (b), it is somewhat curious that no question was put to the plaintiff No. 1 in cross-examination about the division of the jewellery in the morning of the 5th August—a matter within her personal knowledge according to the defendant's case.

(II). Although the *bantannama* states that the division took place in the presence of Mr. Smith, Kirti Bakshi, Lalit Kishore and others, Mr. Smith says that he was not present at the division. The explanation suggested on behalf of the defendant is that Mr. Smith's name appeared in the original draft as he intended to be present, similarly the name of Luchman was not given because it was not known that he would be present. But the division is said to have been made between 7 and 8 in the morning, and it was made over for engrossment at 11 O'clock and there was no difficulty in omitting the name of Mr. Smith and putting in the name of Luchman. It might, however, have been due to a mistake.

(III). Lalit Kishore does not say in his deposition that he was writing on Exhibit H (6) (b) while the Ranis selected first the five articles and then the three articles. The explanation given is that he was not asked about it.

(IV). Kirti Bakshi does not say anything about the division of the jewellery in the morning. The explanation given is that he stated that he was present at the division and, the time of the division being of no importance, he was not asked about it, and Lalit Kishore stated the time of the division only in cross-examination.

(V). That there were 23 items of jewellery, out of which 8 are

said to have been selected by the Ranis and there is the note of Lalit Kishore on Exhibit H (6)(b) that the "remaining fifteen remain for the Raja" but below it "the items belonging to the Raja" mention only 12. Items Nos. 5, 9, 20 and 23 of the will do not appear in the second part of Exhibit H (6) (b) either as given to the Ranis or to the defendant. It is suggested by the learned Advocate-General that these might have been taken by Krishna Prasad and Pran Krishna as they were relations of the defendant and the latter was getting such a large estate. That may be an explanation but it shows that the list was not a correct one, and that it is not improbable that they took some other jewellery also.

(VI). Lalit Kishore in his letter to the Manager, Jheria Raj, dated the 27th April 1920 upon which the inventory Exhibit 153 was prepared wrote as follows :—"Of the articles mentioned in schedule i minus those that have been given to the Ranis ought to be in Raja's possession, it is better to ask him if he has got them all ; if not, those with him should be mentioned and an explanation may be given to those not mentioned, if I remember aright some of the articles were taken by Kumar Saheb and Thakur Saheb and his brothers, they will be the best persons to give you the information."

It is pointed out by the learned Advocate-General that the jewellery stated in the letter as having been taken by Krishna Prasad and Pran Krishna must refer to the jewellery in the Raja's share, as the latter refer to the articles mentioned in schedule i *minus those that had been given to the Ranis*. That is so, but it was stated in Exhibit 153 that all the properties in this list, that is to say, from Nos. 8 to 24, are "in the possession of Kumar Krishna Prasad *from before the year 1918*."

(VII). According to Exhibit H (6) (b) some articles were shown as taken by the Ranis—others kept by the Raja but the schedule which had been filed as part of the *bantannama* shows that it agrees exactly with Exhibit H (6) (b).

(VIII). The *bantannama* does not state the jewellery which the defendant got, but the explanation offered is that the whole estate was the defendant's, that it was only necessary to state what were given to the Ranis as their share—all the rest being left in the possession of the Raja.

It is unnecessary, however, to discuss further these or similar points raised in argument. The plaintiffs called upon the defendant to file a list of the valuable moveable properties left by Raja Durga Prasad and the defendant accordingly produced a list (Ex-

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hibit 153) in the Court below on the 20th May 1920. In part I of that list, 24 items of jewellery were mentioned; Nos. 1 to 7 were stated to be in the possession of the defendant Raja Siva Prasad Singh, and there was a note that "all the properties that is to say from Nos. 8 to 24 are in the possession of Kumar Krishna Prasad Singh from before the year 1918." The list was signed by the defendant Siva Prasad himself, although according to the defendant, the item No. 1 and some of the items 8 to 24 were made over to the Ranis at the time of the division of the jewellery on the 5th August. It is said that this list was a mistake on the part of the defendant's Assistant Manager Mohendra Nath Chatterjee. He swore an affidavit on the 12th July 1920 in which he stated that he was not in the service of the Raj when the division took place (his service having commenced only from January 1919) that the list was prepared without examining and comparing the jewellery in the possession of the Raja; and he gave a long explanation as to how the mistake arose.

He was, however, examined in Court and he stated that "Defendant was at Jheria when Exhibit 153 was prepared. I informed the defendant that an inventory would have to be filed. He ordered Kundarpa to prepare a list of jewelleries. He told him to prepare the list after opening the boxes with the keys.....Kundarpa was in charge of the *Toshakhana* when Exhibit 153 was prepared". His statements in Court certainly contradict those made in his affidavit. The affidavit, it appears, was settled by an eminent lawyer. The Court below observed that there was no doubt that Kundarpa prepared the list on reference to the articles in the *Toshakhana*. It was distinctly stated in Exhibit 153 that item Nos. 1 to 7 were in the possession of the defendant and Nos. 8 to 23 in the possession of Kumar Krishna Prasad. Neither the defendant nor Kundarpa has been examined and in the absence of their evidence we are unable to differ from the Court on the point.

The Court below proceeding upon the list Exhibit 153 holds that the jewellery was not made over to the Ranis. Counsel on both sides agree that Exhibit 153 is absolutely incompatible with Exhibit H (6) (b). It is contended by the learned Advocate-General that the evidence of Lalit Kishore and the list Exhibit H (6) (b) should be acted upon and not Exhibit 153. Lalit Kishore says that he was consulted by the Ranis and requested to make a division of the cash and jewellery, that he "did the work of dividing the jewellery", that the Ranis selected some of the jewellery and

they were all noted in the schedule [meaning H (6) (b)] at the time of the division. It is urged that unless Lalit Kishore forged the Exhibit H (6) (b) subsequently and gave false evidence, it must be held that there was a division of the jewellery. But the jewellery might only have been shown to the Ranis for making their selections. It does not follow that they got the jewellery selected.

The Ranis would not appear before Lalit Kishore and others. According to Mr. Smith, Pran Krishna took Rs. 48000 for payment to the Ranis inside the *purdah*, took the documents to the Ranis for execution and acted as go-between. It is conceded that Krishna Prasad and Pran Krishna might have taken some of the jewellery (though it is said out of the Raja's share). Lalit Kishore nowhere says that he actually saw that the 8 pieces of jewellery were handed over to the Ranis, he might be under the impression that 8 pieces of jewellery were selected by the Ranis and were made over to them, and might have accordingly made the note on Exhibit H (6) (b). His evidence does not prove that the Ranis actually got the 8 pieces of jewellery and in the face of Exhibit 153, we are not prepared to differ from the finding of the Court below that the jewellery was not made over to the Ranis.

Release.

Although the suit against the Bank was decreed on the 31st August 1917, the money was not withdrawn till the 2nd August 1918 nor does it appear that the plaintiffs were informed of it. On behalf of the defendant, it is said that there is an explanation for the delay but that no point was made of it in the Court below, and no one was asked to explain the delay in withdrawing the money from the Bank and offering it to the plaintiff. But not only was a point made of it in the Court below but that Court found that the plaintiffs went on asking for the money and the fact is not disputed by the defendant. The defendant should therefore have given an explanation if there was any. The money, as stated above, was drawn from the Bank in August 1918. It was not, however, entered in the account books for four months i.e. until November 1918. In the meantime, an attempt was made to get a deed of release from the Ranis. It is said that the defendant wanted to get a receipt for the Bank money with the statement that they had no charge of the estate for it. Lalit Kishore, however, admits that it was a "receipt with a clause that the Ranis had no claim under the Will to the money or to the Raj estate." He prepared the draft and it was engrossed upon paper bearing a five-rupee stamp (the stamp for a deed of release). An application was made on the 13th August to the

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Sub-Registrar to come over to Jheria and register a deed of "release" which had been executed by the Ranis. The Sub-Registrar came, but the Ranis refused to execute or register it. It is said that the Ranis had agreed to execute it, but subsequently went back upon their promise. However that may be, according to both parties it was not executed. The engrossed deed which must be with the defendant has not been produced. It is admitted that "all the documents were brought to Calcutta" and that the legal advisers of the defendant decided which documents were to be filed along with the written statement. No one swears that it has been lost and there is no doubt that the defendant has suppressed it.

Whether it was in form a receipt or a deed of release, admittedly it was to be a release of the Rani's claim to the money and to the Raj estate. There was a good reason for it. The Ranis after taking the cash, jewellery and the Bank money might claim the Raj estate as the Will did not lay down who was to succeed to the Raj estate, the provision being that whoever would be the successor would get it. There is no doubt therefore that the defendant wanted to get a release from the Ranis of their claim not only to the Bank money but also to the entire estate itself. The learned Advocate-General said that there was nothing wrong in that, that the *bantannama*, the *Am-muktearnamah* and the decree have not prevented the Ranis from ripping up the whole question again, that the payment of the Bank money would be the completion of the whole transaction, and that the defendant was properly advised that he should be assured by a proper release that the Ranis had no further claim upon him. That is a perfectly intelligible position, but it is clear that the Bank money was withheld from the Ranis until they would execute a release. It also supports the plaintiffs' case that no money in cash or jewellery were made over to them. The same reasons for which the defendant would not make over the Bank money to the plaintiffs until a deed of release was executed giving up all claims to the estate i. e. until he was quite safe would apply to the delivery of the jewellery and the cash to them.

The Ranis having refused to execute the release, there was a final rupture and then the Bank money was credited in the account books in November 1918. It is true the defendant was paying the *khorphosh* money, but in doing so he incurred no risks as the plaintiffs would get *khorphosh* in any case.

Custom about self-acquisitions.

It is contended for the defendant that according to the family

custom of the Jheria Raj, all acquisitions including moveables go to the next holder.

Reference is made to the deposition of Raja Paresh Nath Singh of Palgunge given on the 7th February 1885 (in the Pandra case) in which he stated that if a Raja on obtaining a hereditary Raj "extends it" or purchases a property or gets property by inheritance or by gift from any body, his successor will get the whole according to custom. But he was speaking to the family custom of Palgunge. It is said that Jheria sprang from Palgunge, but the question we have to consider is the family custom of the Jheria Raj.

In the Jheria Raj, when Raja Jharwar Singh died and his brother Pirthi Singh got the estate, Jharwar's widows sued Pirthi Singh for it.

It appears from the Robakari of the Sudder Dewani Adalat dated the 21st April 1825, that the Ranis of Jharwar Singh in their suit against Pirthi Singh while claiming the Raj reserved their right to bring a suit for the moveables subsequently. The suit was dismissed and there is no evidence that any suit was brought for the moveables subsequently. But there might have been various reasons for not bringing the suit or the matter might have been made up amicably, and, so far as the statement goes, it was an assertion against the alleged custom.

Sangram succeeded Raja Pirthi on his death, and Raja Udit succeeded his father Raja Sangram on his death. There is no evidence whether any moveables were left by Raja Pirthi or Raja Sangram and what became of them. Raja Udit was succeeded by his son Rash Behari and the latter, as the son, would get his moveables. Raja Rash Behari purchased parganah Joynagar. In his deposition in the Pandra case on the 11th August 1885 he stated "why should my second son, the Koonwer (Durga Prasad) get the said zemindari of Joynagar?" and further that the rule of succession as regards Joynagar would be like "those of my zemindari and not like those prevailing in Joynagar." But if Joynagar was an impartible Raj the succession to it would be governed by the rule of lineal primogeniture, and would accordingly devolve upon his eldest son. No clear inference, therefore, can be drawn from his deposition.

On Raja Rash Behari's death, Joynagar as well as the moveables were obtained by his eldest son Jaimangal and were not shared by Durga Prasad. The Court below relied upon a passage in the letter of the Deputy Commissioner dated the 14th September 1888

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while taking charge of the estate, where it was stated that both (Jaimangal and Durga Prasad) were wards of the Court, but it omitted to notice the statement that the "former being the eldest is the heir . . . according to primogeniture and the latter was entitled to maintenance allowance only to be fixed by the heir". It also appears that Raja Rash Behari left Rs. 33200 in G. P. Notes which was in a box the "key of which was with the proprietor" (in the singular). Then there was an instalment decree payable in instalments of Rs. 1000 obtained by Rash Behari, and some immoveable properties purchased by him at Purulia in the name of Durga Prasad, all of which were taken possession of by the Court of Wards. Paresh Nath Ghose applied for mutation of name as sub-manager on behalf of Jaimangal "minor proprietor of Joynagar estate". The G. P. Notes were sold and Taluk Telo was purchased with the proceeds, and when Jaimangal attained majority, the balance to the credit of the estate and decrees etc. were made over to him.

It appears that the Court of Wards when taking possession of the estate mentioned the names of both the minors—Jaimangal and Durga Prasad—as wards of the Court. Ramkalpa Mahata was appointed guardian "of the two minor proprietors of the Jheria estate," and a private tutor was appointed to "the two minor proprietors of the Jheria estate"; and there is an order sanctioning the disbursement of Rs. 442 for purchase of clothes for "the two minor proprietors". It seems, therefore, that the Court of Wards treated both the brothers as the proprietors of the estate. On the other hand, as stated above, in the letter of the Deputy Commissioner it was said that the eldest is the heir, and the application for mutation of names in respect of Joynagar was in the name of Jaimangal alone. When the Court of Wards gave up charge on Jaimangal's attaining majority, the entire estate, money etc. were made over to him. But he and Durga Prasad were members of a joint family and he was the eldest member.

Having regard to all these circumstances, it is not a clear case of the custom set up.

On Raja Jaimangal's death, Durga Prasad succeeded to all his properties, moveable and immoveable and this is strongly relied upon by the defendant. The cash left by Raja Jaimangal was taken possession of by Durga Prasad. The valuables were all locked up under the orders of the Collector (See Rakhil Das Sarkar's report dated 3rd September 1899), and Durga Prasad was called upon to furnish security to the extent of Rs. 20,000.

On the 24th September 1899, however, Rani Chatura Kumari put in a petition stating that "under the prevailing (torn) of this Raj family, no female is entitled to inherit" and that "under the *shastras* and (torn)" Durga Prasad had on the death of her husband became the "owner (torn) and all moveable and immoveable properties". "In accordance with the prevailing custom (torn) the other Rajas, zemindars, relatives and friends on the 31st Bhadro invested him with the Raj *Tika* and *Pugree* at the time of the installation".

Raja Durga Prasad by his petition dated the 2nd October 1899 stated that Rani Chatura Kumari had "admitted that under the custom obtaining in the Raj family of Jheria and according to the law of Mitakshara she was not the heir to the said zemindari and that she had no claim thereto", and prayed that the moveable properties might be released without any security being furnished therefor. The moveables were, accordingly, ordered to be made over to Durga Prasad.

It appears from the evidence of plaintiffs' witness Jagabandhu Roy that at the time of the "Tika Pugree" of Raja Durga Prasad, Rani Chatura Kumari's father came and raised an objection to his succession, and one or two persons joined in it, but that it was explained to them that in a litigation carried up to the Sudder Dewani Adalat it had been settled that if there be full brother living in joint mess, the widow does not get the Raj, and that they should not spend a lot of money for nothing, that the estate was in danger of being ruined on account of debts, and litigation up to the final Court would cost ten lacs of rupees and nothing would be left, that after that the Raja had Golap Sastri fetched who also explained everything to all and then they desisted. The defendant's case on the point was that no claim was preferred to the estate, the only dispute was as to the maintenance which was settled at the *majlish* (assembly) held on the occasion, and that no claim was preferred to the moveables or self-acquisitions on behalf of Rani Chatura Kumari. It is contended that according to the evidence adduced by the plaintiffs, a dispute was raised and was settled in favour of Durga Prasad who got all the moveables as well as all the immoveable properties. But the very fact that Golap Sastri was brought down to Jheria by Raja Durga Prasad shows that there was a serious dispute about the succession. The statement of Jagabandhu Roy is corroborated by the evidence of Kirti Bakshi who said "At the time Durga Prasad got the *Gadi*, I heard that there was a ruling that females would not get the *Gadi*. Golap

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Sarkar's son had a book with him in which this ruling was noted. He is not a pleader. I read the ruling. On reading it I understood that females would not get *Gadi*. He brought the ruling there after Durga Prasad got the *Gadi*. I cannot say why he brought it there. Golap Sarkar and his son were on the side of Durga Prasad. It is not a fact that Indra Banerjee was on the side of Maharani Chatura Kumari. Question—Is it not a fact that Indra Banerjee, Golap Sarkar and his son came to Jheria as Maharani Chatura Kumari claimed the *Gadi*? Answer—No. There was no question of Maharani Chatura Kumari getting the *Gadi* at the time."

Kirti Bakshi cannot say why the ruling about female exclusion was brought by Golap Sarkar, and although he says there was no dispute about the succession, it is difficult to see why Golap Sarkar and his son were taken down to Jheria with a ruling about female exclusion. This could not have been for settling the amount of maintenance. The fact seems to be that a dispute was raised as to the succession. Golap Sarkar was taken to Jheria, and the matter was amicably settled and the Rani submitted the petition.

Raja Durga Prasad executed a deed on the 25th January 1900 reciting that he was entitled to the Raj under the Mitakshara law and family custom and had been installed on the *Gadi*, and agreeing to pay Rs. 3600 as her maintenance as settled at the time of the *Sradh* of Jaimangal.

Rani Chatura Kumari in her deposition in the present case stated that Durga Prasad became the malik of everything, that she got mouza Dheya as *khorphosh* and the pocket money, which was sufficient. She was then asked "Did you not say this to Durga Prasad after the death of Jaimangal:—You are my *debar* (husband's younger brother), my object of affection, what shall I do with the movable properties you enjoy them all"? She answered "Yes". It is contended by the defendant that it was not because of her fondness for Durga Prasad that Rani Chatura Kumari gave up her claim, but on the contrary she made a claim which was unsuccessful. There is, however, the evidence of the Rani herself.

The learned Advocate-General says that the question put to her was a "double-barrelled, tricky" one. But there was no re-examination on the point, and she admitted that she had affection for Raja Durga Prasad as a son and that the latter reciprocated it. It seems that once the dispute raised by her father as to the succession to the estate was settled, the question of moveable properties was settled amicably and she put in the petition admitting the claim of Durga Prasad.

The Court below observes that "she gave up her claim for the moveables as she liked Durga Prasad very much....In the first instance in the family the two brothers lived in the same mess and in the second instance there was some contention after the death of Jaimangal and some sort of amicable arrangement was arrived at. So one cannot rely upon these two instances as giving a clear indication of the existence of a custom". We agree with the Court below in its observations on the point.

But assuming that it is an instance of the custom, the instance is of a very recent date (1899), and one or two instances, specially of such recent dates, cannot prove a custom. A few instances may be explained by ignorance of law or by good feelings between the parties. In the case of *Chandika Bakhsh v. Muna Kuar* (1) where a custom of succession in derogation of the ordinary law was sought to be proved, Lord Macnaghten observed that "in support of the alleged custom four instances at most can be adduced and these of a comparatively modern date and there is no other evidence. It is obvious that a family custom in derogation of the ordinary law cannot be supported on so slender a foundation". In *Abdul Hussain v. Bibi Sona Dero* (2) Lord Buckmaster observed "But as pointed out by this Board in *Ramalakshmi Ammal v. Sivanantha* (3), it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends". See also *Durga Charan v. Raghunath* (4) and *Ambalika Dasi v. Aparna Dasi* (5).

Reference was made on behalf of the defendant to the case of *Garurudhwaja v. Saparandhwaja*, (6) where there was evidence of a family custom (succession by primogeniture) for 80 years, and the family belonged to a group of families in which the custom had been in existence from time immemorial, and it was held under the circumstances that the family custom had been proved. But no

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(1) (1901) L. R. 29 I. A. 70; I. L. R. 24 All. 273.

(2) (1917) L. R. 45 I. A. 10.

(3) (1872) 14 M. I. A. 570 (585); L. R. I. A. Sup. 1.

(4) (1913) 18 C. W. N. 55 (57-58); 18 C. L. J. 559.

(5) (1918) I. L. R. 45 Calc. 835 (857-858); 29 C. L. J. 264.

(6) (1900) L. R. 27 I. A. 238; I. L. R. 23 All. 37.

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such custom has been proved in this case and as for the group of families, there is no uniform custom, e.g. in Nowagarh females succeed.

Reference was made to an observation in *Maharani Hiranath Koer's case* (1) that in order to establish a *Koolachar* you must at least show one of two things—either a clear, distinct and positive tradition in the family that the *Koolachar* exists, or a long series of instances of anomalous inheritance from which the *Koolachar* may be inferred, and to the observations in *Mahamaya Debi v. Haridas* (2) that it is well settled that evidence showing exercise of a right in accordance with an alleged custom as far back as living testimony can go raises the presumption though only a rebuttable presumption as to the immemorial existence of the custom, and that if the existence of the custom has been proved for a long period the onus lies on the person seeking to disprove the custom to demonstrate its impossibility. In the Jheria family the existence of the custom has not been proved for a long period. As for instance of anomalous succession, we have dealt with the case of Jharwar Singh's widows. On Raja Jaimangal's death Durga Prasad as an undivided brother was entitled under the law to the estate. It is true he got the moveables also but, as stated above, there was an amicable arrangement with Rani Chatura Kumari. Nor is there any clear, distinct and positive tradition in the family about the custom. There is the statement of Raja Rash Behari about the custom of female exclusion, but he was financing the plaintiff in that litigation, and that is insufficient to prove any custom. As to the custom about moveables, there is no evidence about *tradition*. No one speaks to the existence of any tradition in the family about *moveables* and self-acquisitions. The learned Advocate-General tried to draw the inference from the fact that Jaimangal got all the properties, moveable as well as immoveable, on Jaimangal's attaining majority, the Court of Wards making over all the properties to him. But Jaimangal and Durga Prasad were two brothers living as members of a joint family and the Court of Wards without going into the rights of the two brothers as between themselves made over the entire estate on the elder's attaining majority.

The absence of any instance of succession to separate property in the Jheria Raj was relied upon. But the instances in which such question could arise have been sufficiently explained as stated above. On the whole, we are of opinion that the custom of exclusion from succession to self-acquisition has not been proved.

(1) (1872) 9 B. L. R. 274 (284); 15 W. R. 375.

(2) (1914) I. L. R. 42 Calc. 455 (470, 474); 20 C. L. J. 183.

Self-acquisition.

With regard to the question whether the income of an impartible estate or properties acquired therewith is to be regarded as accretion to the estate we need only refer to the Serampore case [*Rani Jagadamba Kumari v. Wazir Narain Singh* (1)]. In that case, all the estate possessed by the Raja other than the impartible Raj was derived from the income of Raj itself. "There were certain villages, certain mortgages usufructuary or otherwise, sums due on bonds and decrees, Government promissory notes to the extent of two lacs and other moveable and immoveable properties." With the exception of the Government promissory notes, the whole of these had been awarded by the High Court to the plaintiff (who was found entitled to the impartible estate) upon the ground that they represented an accretion to the estate and descended with it. The Judicial Committee observed:—"Their Lordships think that this conclusion is wrong, and that its error is due to the idea that the produce of the impartible estate naturally belongs to and forms an accretion to the original property. In fact, when the true position is considered there is no accretion at all. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort, or that had come to him in circumstances entirely disassociated from the ownership of the Raj. It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character."

"It is possible that this confusion is due to the consideration of the position with regard to an ordinary joint family estate. In such a case the income, equally with the corpus, forms part of the family property, and if the owner mixes his own moneys with the moneys of the family—as, for example, by putting the whole into one account at the bank or by treating them in his accounts as indistinguishable—his own earnings share with the property with which they are mingled the character of joint family property; but no such considerations necessarily apply to the income from impartible property."

Upon the question of incorporation of the properties acquired with the impartible estate, it appears that the income of the estate was utilized by the Raja in giving loans and purchasing other properties, and the income of zemindaries purchased as also loans with interest when repaid were entered in the books of the estate and treated as a part of the income of the estate, and all this was done

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at the instance of the Raja, but their Lordships held that this was insufficient to affect the property with the character of impartibility.

In the Jambuni case [*Rani Parbati Kumari v. Jagadish Chander Dhabal* (1)], some property was bought out of the savings of the estate by the Court of Wards during the Raja's minority and their Lordships observed "All that the defendants can point to as indicating Purno's intention to deal with them as part of the Raj is that the rents were collected by the same servant and the collection papers kept with the papers of the Raj. Their Lordships do not find in these meagre facts adequate ground for holding that the Raja intended to incorporate the four moveables with the ancestral estate for the purposes of the succession. The four moveables must therefore follow the rule of the Mitakshara Law as to self-acquired property." See also *Janki Pershad Singh v. Dwarka Pershad Singh* (2) — a case under the Oudh Talukdar's Act and *Murtaza Husain v. Mahomed Yasin* (3).

It is contended, however, on behalf of the defendant that the gross income of Perganahs Jheria and Joynagar at the time of Raja Jaimangal was only about Rs. 35,000. Raja Durga Prasad was in possession from September 1899 to March 1916 i.e. about 16 years, so that even taking Rs. 35,000 to be the full income available in 16 years it would be less than 6 lacs of rupees. But the self-acquisitions claimed by the plaintiffs would be about 30 lacs of rupees so that the properties moveable and immoveable claimed as self-acquisitions could not have been acquired from the income of the estate. Reference is made to paragraph 2 of the plaint where it was stated that the estate consisted formerly of a property of inconsiderable income that afterwards during Raja Durga Prasad's time coal mines were discovered and the income of the estate had swelled to about ten lacs a year, and was now considered to be one of the biggest estates in Bengal, Behar and Orissa.

Reference was made to Mitakshara, Chapter I, Section IV paras 1, 2 and 6, Mayne's Hindu Law 9th edition Para 281 and *Gokal Chand v. The Firm of Hukam Chand* (4) to show that property which is acquired without detriment to the estate is self-acquisition, not where it is acquired with detriment to the estate, that a lease of coal land is really a sale of the corpus, and that the *salami* (bonus) and royalties of such lands cannot be said to be *income* of the lands,

(1) (1902) L. R. 29 I. A. 82 (98) ; I. L. R. 29 Calc. 433.

(2) (1913) L. R. 40 I. A. 170 (181) ; I. L. R. 35 All. 391 ; 18 C. L. J. 200.

(3) (1916) L. R. 43 I. A. 269 (281) ; I. L. R. 38 All. 552 ; 25 C. L. J. 1.

(4) (1921) L. R. 48 I. A. 162 (165) ; 33 C. J. J. 355.

and it is accordingly contended that the properties were not acquired without detriment to the estate, and it is for the plaintiffs the party who claim the self-acquisitions to show that they were not acquired without detriment to the estate.

It is not disputed that a lease of coal lands is really a sale of the corpus, but the principle that only acquisitions made without detriment to the estate are self-acquisitions has no application to the present case. In the case of ordinary property only an acquisition by a member without detriment to the family property would be his self-acquisition. But in the case of an impartible estate, the holder is the owner both of the impartible estate as well as its income. We do not see therefore how the question of "without detriment" arises in such a case. It is now settled by the decisions of the Judicial Committee in *Sartaj Kuar's case* (1) and the *1st Pittapur case* (2) that the holder of the estate can alienate it at his pleasure. He is therefore under no obligation to preserve the corpus of the estate for the benefit of the successors to the estate. It is contended, however, that if the owner does not dispose of the estate but converts a portion of it into money, such money does not constitute his separate estate nor follow the succession to the separate estate but devolves along with the estate upon the successor. If, however, a portion of an impartible Raj is sold and converted into money or some property is purchased with the money, does the money or the property purchased with it continue to be impartible estate? The junior members have merely a right to maintenance under custom and a possible right of succession to the impartible estate. The owner of the estate however can put an end to such right by alienating it or converting it into money.

If, therefore, the holder of the impartible estate sells a portion of it and converts it into money, it is no longer a part of the impartible estate. It is not a question of an intention to sever but actual conversion of the estate into money. The junior members have no right whatsoever to what is not impartible estate, and the money to which it is converted is freed from the rights of the junior members whatever they may be, and become the absolute property of the holder of the estate. If the junior members have no proprietary right to the corpus, they have none to the money to which the corpus may be converted nor to the income of the estate.

Monies received on account of mining leases, or royalties from mines or compensation under the Land Acquisition Act at the best

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(1) (1887-88) L. R. 15 I. A 51; 1. L. R. 10 All. 272.

(2) (1898) L. R. 26 I. A. 33; 1. L. R. 22 Mad. 383.

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stand on the same footing as a sale, and junior member cannot have any right to any of them, once it is held that the holder of the estate has an unrestricted power of alienation.

It may be said that it depends upon the question of intention. But would not the very fact of selling a portion of the estate indicate his intention of severing the money or the property purchased with it from the partible estate? We think that in such event the money or the property purchased with it is freed from the possible rights of the junior members unless the money or the property is incorporated with the estate.

We will now deal with the properties claimed as self-acquisitions one by one.

Immoveable properties.

Joynagar.

This was purchased by Raja Rash Behari. The defendant says that it was incorporated by Raja Rash Behari. We have referred to the deposition of Raja Rash Behari in the Pandra case where he stated that his eldest son would also get the zemindary of Joynagar. "Why should my second son the Kumar get the said zemindary of Joynagar?" On his death the Court of Wards took possession, and on Jaimangal's attaining majority he got his name recorded as proprietor.

It is said that Raja Rash Behari, who had purchased Joynagar, might have been under the impression that it should devolve as a Raj upon his eldest son and that the law of primogeniture would apply to it also, and that no necessary inference arises that he intended to incorporate it with the Raj. But whatever his impression might be, it seems to us that he did intend that Joynagar should form part of the Jheria estate.

The judgment in the Tisra case stated "Joynagar now forms part of Jheria Raj by purchase." After Jaimangal's death Durga Prasad claimed the whole of Joynagar *by survivorship*. It was contended that the incorporation must be by the person who acquired it, but from what we have stated above it would appear that Rash Behari incorporated Joynagar with the Raj. The Court below has disallowed the claim with regard to Joynagar and we think rightly.

Telo.

The Court below finds upon the evidence of Paresh Ghose that Telo was incorporated with the impartible estate.

It is to be observed that if Joynagar and Telo were not incorporated by the Raja, they would go to his widow Rani Chatura Kumari and the plaintiffs cannot claim them in any event. It appears that some rents of Telo were entered in the account books

as *Huzur Dakhil*, but similar entries also appear in connection with the rents of Jheria also. So no inference can be drawn in favour of the plaintiffs from the *Huzur Dakhil* entries.

In the will of Raja Durga Prasad, it is stated that the Perganahs Jheria and Joynagar are his ancestral properties, that whoever would be his successor would get the same as well as other immoveable properties and it was not necessary to make any direction with regard to them.

It is contended on behalf of the plaintiffs that Jheria and Joynagar are referred to as two separate entities and no inference can be drawn that Joynagar was incorporated with the impartible estate Jheria. But so far as Joynagar is concerned, we have said that it was incorporated with the estate by the acquirer Raja Rash Behari. The other immoveable properties, however, stand on a different footing. They are referred to as "other immoveable properties" separately from Jheria and Joynagar which are described as "my ancestral zemindaries". It is true that the will proceeds to state "Whoever will be my heir on my death shall get the said properties and it is not necessary to make any direction with regard to them." But that merely shows his impression that all the immoveable properties would go to his heir, it does not show incorporation. It is contended for the plaintiffs that incorporation cannot be made by a revocable document such as a will that it is not permissible for a person to say that certain properties should not be incorporated during his life-time but that after his death it should be incorporated, that is, that instead of following the ordinary course of succession it will follow the law of devolution applicable to an impartible estate. The learned Advocate-General contended that the properties were incorporated during the life-time, the will merely being evidence of such incorporation. We do not, however, see that there was any incorporation during the life-time of Raja Durga Prasad, and we think that with the exception of Pergunah Joynagar which was incorporated by Raja Rash Behari no other property was incorporated with the Jheria estate. Properties Nos. 2 to 7, however, appear to be family properties of Raja Durga Prasad. Property No. 3 Telo, No. 6 the bungalow at Purulia, and No. 7 Rajgunge cutchery were acquired by Raja Jaimangal, and Raja Durga Prasad claimed them on the death of Raja Jaimangal by survivorship. It appears that the rents of Telo were sometimes paid to Raja Durga Prasad as *Huzur Dakhil*, but the same system prevailed with regard to Jheria also. We do not, however, attach any importance to the *Huzur Dakhil* entries, because as the *Serampore*

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case (1) shows, the mere fact that rents are credited to the account books of the estate or treated as part of the income of the estate is not sufficient to affect the property with the character of impartibility. But properties Nos. 2 to 7 of schedule *Ka* were either the *ancestral* properties or properties which devolved upon Raja Durga Prasad on Raja Jaimangal's death, and we do not think they can be claimed by the plaintiffs as the self-acquisitions of Raja Durga Prasad. If Telo and the other properties which were acquired by Raja Jaimangal were not incorporated with the estate they would devolve upon his widow Rani Chatura Kumari, and not upon the plaintiffs. We, accordingly, agree with the Court below so far as properties 2 to 7 of schedule *Ka* are concerned.

Properties Nos. 1 to 19 of schedule *Kha* are claimed as the self-acquisitions of Raja Durga Prasad. Reference was made to a passage in the judgment in the case of *Gurusami v. Pandra Chinna* (2), where certain properties (near the palace) which were used by the zemindar and were never let out were held to be incorporated. But they were near the palace, they were neighbouring properties which had not been separately enjoyed and therefore must be reasonably treated as appurtenant to the palace itself. Reference was also made to a passage at page 25 where two bungalows (at the head-quarter stations of the two taluks in which the zemindar's property lay), which were never let out, were held to have been made part of the estate for its use, although outside the zemindary limits. But the zemindar and his officials had been using them when going to transact zemindary business as they had often to do. Calcutta was no doubt the capital of Behar also at the time the house (239, Lower Circular Road) was purchased, but it does not appear to have been used for the purpose of transacting any zemindary business and there is nothing to show that Raja Durga Prasad intended to incorporate it with the Raj estate.

Property No. 1 consists of 5 bighas of land and a house in premises No. 239, Lower Circular Road, Bhowanipur, Calcutta referred to above. The house was purchased by Raja Durga Prasad at Rs. 1,50,000 in 1908. The cost of construction of the privy, marbling the floor, electric lights and fans, repairs, electric supply, municipal taxes, the pay of the gardener &c. were all paid by the estate. It is referred to as the *basatbati* at Calcutta in the entry as to electric lights and fans, and it was used as the residence of the Raja when he came to Calcutta. But the expenditure referred to above would be incurred in any case, and the mere fact that it was

(1) (1920) I. L. R. 44 Mad. 1 (24).

(2) (1922) L. R. 50 I. A. 1; 37 C. L. J. 287.

incurred does not show that it was intended to incorporate the house with the impartible Raj.

Property No. 2 is the Madhupur house which was purchased for Rs. 31989 in 1908. Similar costs of repairs &c. were paid by the estate for this house also and it was never let out.

No. 3—Four Bighas of land at Bankipur purchased in 1915 at Rs. 200. No. 4—Five bighas of lands with house also at Bankipur purchased in 1915 for Rs. 17200. The entries show the cost of purchasing and constructing a house.

No. 5—Twenty two bighas of garden at Ranchi. There are entries with regard to the lease (a permanent lease) cost of construction of building, rents and cesses and municipal taxes of the house.

No. 6—*Patkum* consists of mouzabs Situ and 10 other mouzabs in Perganah Patkum, a *makarari* right purchased in 1903 for Rs. 17000. The entries show payment of the price, rents realised and credited, rents, cesses and litigation expenses debited to the estate. Jagabandhu Roy says that the price was paid by the Raj and debited to the estate.

No. 7—*Koro*—a *lakheraj* property purchased at Rs. 120000 in 1904, the money being raised on loan taken from Messrs. Mackinnon Mackenzie & Co. on a registered mortgage. There are entries showing payments of portions of the loan by setting off the royalty of coal lands held by the company. The entries show rents realised and credited, some of the rents realised from Koro are entered as *Huzur Dakhil* (i.e. paid to the Raja himself) but there are other rents realised which are not so entered.

Koro was settled in *makarari* with plaintiff No. 1 in 1912 and there is an entry of Rs. 101 as bonus realised from the plaintiff No. 1.

No. 8—Taluk *Kurko* purchased in 1907 for Rs. 4000. The entries show the payment of the purchase money on various dates, expenses in connection with the same, litigation expenses, rents and monies realised under instalment bonds credited. Expenses for excavating a tank, those for repairs of the cutchery house and sowing paddy, settlement expenses of Kurko, and expenses of the Cutchery there.

There are many entries showing rents realised or money under instalment bonds and paid to the Raja Bahadur himself. But there were some rents realised which are not shown as so paid.

The observations made by us with respect to 239, Lower Circular Road apply to properties Nos. 2 to 8 also.

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As the Court below points out, properties Nos. 1 to 8 of schedule *Kha* are outside the boundaries of the zemindaries and with the exception of item No. 6 they are in different districts altogether.

Nos. 9 to 19.

No. 9 is the Raj palace, No. 10 is the European guest house, No. 11 is the electric power house, No. 12 is the Manager's quarters No. 13 to 17 are Bungalows—all these in Jheria, No. 18 is a Bungalow on a river bank and No. 19 is the pleasure house at Dheya—the last two are outside the village Jheria, though in Perganah Jheria. So they are on the lands of the impartible estate itself and are used as appurtenant to the Raj. The Court below observes that "properties Nos. 9 to 19 must go with the estate as being improvements and additions to the estate. The very fact that they are on lands belonging to the impartible estate shows an intention to incorporate them with the estate. I shall therefore hold that the devolution as regards the items. Nos. 9 to 19 of schedule *Kha* follows that of the impartible estate". We agree with the Court below so far as the immoveable properties of schedule *Ka* and *Kha* are concerned.

No. 20—moveable properties.

With regard to moveable properties, it is contended that the will of Raja Durga Prasad shows that they were incorporated with the estate. The passage in the will runs as follows: "But six annas of the diamonds and other jewelleries gold and silver &c. mentioned in the schedule hereto which I have and those which I shall purchase hereafter besides these and all cash monies, notes, gold and silver &c. which will be there in my own *tebbil* or in the Bank of Bengal or any other Bank at the time of my death shall form part of my zemindary and whoever will get the zemindary at any time shall possess and enjoy the same, and my wives (those who will be living at the time of my death) shall get the remaining ten annas of the said diamonds and other jewelleries, the notes, cash moneys, silver and gold &c.".

But, in the first place, we think there can be no incorporation of moveable properties with an impartible estate. In order that there may be incorporation, the property to be incorporated must be of the same nature as the impartible property. The Jheria estate is immoveable property, and it seems to us that only immoveable property can be incorporated. Then, again, incorporation involves altering the ordinary course of succession. The holder of the im-

partible estate by purchasing a cow or a horse, for example, would be able to alter the course of succession to it by declaring his intention to incorporate it with the estate.

It is true that in the case of *Sarabjit Partap v. Indarjit Partap* (1) Stanley C. J. and Burkkitt J., were of opinion that moveable property (in that case) was appurtenant to and part of the Raj estate, and as such passed to the defendant who was held entitled to the estate. But it appears that the plaintiff executed an *ekrarnama* on the basis that all the property formed portion of the estate, and descended in accordance with the family custom, and the learned Judges said that if they were right in thinking that the *ekrarnama* was binding it was obvious that the claim in regard to the moveable property could be no more supported than the claim, to the immoveable property. In that view, the observations were *obiter*. However that may be, in the *Serampore Case* (2) the Judicial Committee observed "whether it be possible in any circumstances to treat moveable property as an accretion to a landed estate of this character is a matter not arising for decision. It is true that in *Sarabjit Partap v. Indarjit Partap* (1) it was decided that moveable property could be so regarded, but as the point does not arise here, their Lordships need only say that they must not be regarded as accepting the soundness of that decision". Their Lordships did not approve of the decision in *Sarabjit's case* (1) and we are of opinion that moveable properties cannot be incorporated so as to make it impartible estate. In the next place, the provision in the will that the jewellery &c. shall form part of the estate does not necessarily show incorporation with the impartible estate. The vernacular words "*shamil thakibey*" are somewhat ambiguous. They may mean "continue to form part part of" or "shall form part of". However that may be, it is contended on behalf of the plaintiffs that incorporation cannot be made by a revocable document such as a will which moreover speaks "only from the death of the testator," that it is not open to a person to direct certain properties (not incorporated with the estate in his life-time) to be treated as impartible after his death so as to follow a course of succession different from the ordinary, and that in any case an undivided six annas share cannot be incorporated, because before division it cannot be predicated of any particular property that it is part of the estate. The learned Advocate-General contended that the will did not incorporate the moveables, that the 16

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(1) (1904) I. L. R. 27 All. 203 (253).

(2) (1922) L. R. 50 I. A. 1 (8) ; 37 C. L. J. 287.

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annas (entire) moveables had already been incorporated with the estate, and that the will is strong evidence of the incorporation and of the manner in which he had treated the moveables, and it provides that a six annas out of the moveables incorporated shall continue to form part of the estate. But the will does not say that there had been incorporation of the entire moveables, and it seems to us that the provision that six annas "shall form part" or "continue as part" of the estate is the manner of expressing the bequest made to the successor.

As for the provision that the properties which would be purchased "hereafter" i.e. after the date of the will, obviously there could be no incorporation of such after acquired properties, and that supports our view that the provisions in the will about the moveables does not show incorporation. It may be pointed out that there is no provision in the will that the moveable properties other than these mentioned in the schedule (to the will) were to form part of the zemindary.

There is a provision in the will that in the case of a birth of a son, he or the eldest, if more than one son were born, would get the estate and the other sons would get maintenance, but it was provided that the will in that event would become invalid and inoperative.

We now proceed to deal with the moveable properties. Items Nos. 1 to 23 are jewellery which have already been dealt with by us. Item No. 24 relates to several motor cars out of which the Minerva, Berliet and Hupmobile cars which were purchased by Raja Durga Prasad have been allowed to the plaintiffs and the rest disallowed as they were purchased by the defendant.

With regard to the sum of Rs. 7,17,400 on account of the current deposit and fixed deposit in the Bank, the Court below has decreed the sum (with certain deductions to be presently noticed) to the plaintiff with interest thereon at 6 per cent from the time of institution of the suit. The plaintiffs contend that they are entitled to interest from the dates when the deposits became due. It is contended, on the other hand, that the defendant was under no obligation to realise the interest or withdraw the deposits when they fell due, that the plaintiffs did not claim interest in the plaint and they are not entitled to get any interest there being no agreement to pay interest, that although there was no claim for interest in the plaint even after the institution of the suit, the Court below has allowed it, as it had power to do so under section 34 of the Civil Procedure Code.

But although the defendant may not be liable for interest from

the dates on which the fixed deposits became due, the plaintiffs being entitled to the money in the Bank there is no reason why they should not get the interest upon the money in the Bank which has been realised by the defendant. The decree against the Bank was obtained on the 31st August 1917, and we think that the plaintiffs are entitled to the *sum decreed against the Bank*, together with interest thereon from the date on which the defendant got the money, and not merely from the date of the institution of the suit. It is true that there was no specific prayer for interest in the plaint but if as we find that the plaintiffs are entitled to interest prior to the date of the suit, they can get the relief under the general prayer.

Then, again, the Court below has deducted the sum of Rs. 48000 and odd found by it to have been paid under the *bantannama* to the plaintiffs and the sum of 2½ lacs of rupees paid to the plaintiffs in the Court below and allowed interest upon the balance from the institution of the suit. We have held that the payment of Rs. 48000 and odd to the plaintiffs has not been proved, so interest upon the 2½ lacs only should be deducted, but there is no reason why the defendant should not pay interest between the date on which the defendant got the money from the Bank and the 10th March 1920 on which date two lacs of rupees was paid and the 23rd March 1920 on which Rs. 50, 000 was paid to the plaintiffs in the Court below.

Monies realised after Raja Durga Prasad's death.

It is contended that the plaintiffs being entitled to the self-acquisitions are also entitled to the royalties, rents and debts which became due during Raja Durga Prasad's time and which have been realized subsequent to his death by the defendant, and the case of *Aparna Debi v. Shiba Prashad Singh* (1) (a case relating to this very estate) is relied on. In that case, the present defendant Siva Prosad sued a tenant for arrears of rent and royalty a portion of which related to Raja Durga Prasad's time, and the High Court held that the right to recover arrears of rent which fall due during the life-time of the holder of an impartible estate, but which are not realized by the such holder, passes to the latter's heirs and not to the person who succeeds to the estate. Das J. (Ross J. agreeing with him) observed "It has been held by the Judicial Committee that the produce of an impartible estate does not necessarily belong to and form an accretion to the original property".

. (1) (1924) I. L. R. 3 Pat. 367.

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"In this case we have no evidence that the late Raja treated the produce of the estate as an accretion to the estate. That being so, *prima facie* the plaintiff is not entitled to rent which accrued due in the life-time of the late Raja. It was, however, contended on behalf of the respondent that unrealized rents cannot be regarded as a self-acquisition as they still adhere to the estate. I am unable to accede to this argument. Rent which has become due is produce of the impartible estate whether that produce has actually come into the hands of the owner or not. I can make no distinction between realized rent and unrealized rent in this respect". We entirely agree in these observations.

It is contended, however, on behalf of the defendant that it is only the income which was received in Durga Prasad's time, and not that which merely accrued due, which would devolve upon the Ranis and that the Judicial Committee in the *Serampore case* (1) did not hold that unrealized arrears are income which is the absolute property of the holder of the estate. Reference is made to the passage at page 7 where their Lordships observed :—"The income when received is the absolute property of the owner of the impartible estate". But the passage cannot be read as meaning that it is *only when the income is received* that it becomes the absolute property. In that case the income *was received*, and therefore their Lordships said "The income when received". The reasons given by their Lordships in the next passage indicate that it was not intended to confine the rule only to cases where the income is actually received during the life-time of the holder. Their Lordships observed :—"It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character".

The utmost that can be said is that their Lordships did not decide the question of unrealized arrears. We are referred to the case of *Bhagabati Koer v. Sahudra Koer* (2), and it is contended that the holder of an impartible estate is in a position analogous to that of a Hindu widow so far as the right to the income is concerned. In that case the learned Judges observed that unrealized rents in the hands of tenants cannot be treated as temporary savings by a Hindu widow on her own account but should be looked upon as an accretion to her husband's estate. But we do not think that the interest of the holder of an impartible estate is analogous to that of a Hindu widow. The Hindu widow has a limited interest

(1) (1922) L. R. 50 I. A. 1 ; 37 C. L. J. 287.

(2) (1911) 16 C. W. N. 834.

whereas it is now settled that the holder of an impartible estate has absolute powers of disposal over the estate. There is no authority against the view taken by the Patna High Court, which upon principle appears to be right, and we agree with it.

Moveable properties.

• With regard to the moveable properties, the Court below observed—"the parties have not adduced any evidence before me as regards their price I shall therefore accept the price of these items as given in the plaint."

But the value of the articles was disputed by the defendant in the written statement and the 13th issue raised the question "what are the moveable properties left by Raja Durga Prasad and what their respective value". In these circumstances, the Court below should not have accepted the values given in the plaint without any evidence. It is contended on behalf of the plaintiffs that there should be an enquiry as to the moveables and their value. The defendant contends that he and not the plaintiffs can complain of the decree on the point, that had the Court below given a decree for the articles and not for their value, the plaintiffs could not have come to the appellate Court and said that they should be allowed to adduce evidence as to their value, and that the plaintiffs not having adduced evidence cannot now ask the Court to allow them to do so. But the defendant having raised the question in his appeal, we think the appellate Court can order that the proper procedure should be followed. We think there should be an enquiry as to the moveable properties left by Raja Durga Prasad and as to their value.

Apart from discovery and accounts, it is contended that the plaintiffs are entitled to certain sums of money realized by the defendant viz. (1) Five lacs and thirty-five hundred rupees realized in 1916 from Maharaja Manindra Chandra Nandy as royalty.

(2) Rs. 35000 realized from Tika Prasad.

(3) One lac and thirty thousand realized from the Raja of Barabhum.

(4) Rupees 18000 realized from the Tikait of Pathrol.

(5) Rupees 54000 due from Mr. Smith.

(6) Rupees 20000 due from Kunjo Behari Singh of Nunyad.

(7) Rupees 9000 from Ram Chandra Singh of Nala.

(8) Rupees 300000 in the iron chest.

(9) Arrears of royalties of the time of Raja Durga Prasad

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with interest thereon from the 7th March 1916 the date of death of Raja Durga Prasad.

The defendant's contention is that there is no evidence of realization of these sums by the defendant. So far as the items Nos. (1) and (2) are concerned, they are specifically mentioned in the affidavit sworn by the plaintiff No. 1 on the 11th September 1919 in support of her application for the appointment of a Receiver. Paragraph 55 of the affidavit runs as follows—"That your petitioners have further ascertained from the said Babu Ram Kalpa Mahata that the defendant since he obtained wrongful possession of the said Jheria Raj estate has realised large sums of money due by different persons to the said Raja Durga Prasad as his own money on different accounts, among others.

(a) In the year 1916 he realized the sum of Rupees Five lacs or thereabouts from Maharaja Sir Manindra Chandra Nandy Bahadur of Cossimbazar in execution of a decree which had been obtained by the said Raja Durga Prasad Singh.

(b) The sum of Rs. 35000 from Tikait Krishna Prasad Singh of Pathrol.

(c) And by execution of various other decrees the particulars of which your petitioners have not been able to ascertain yet". So it does not rest merely upon an allegation, as it is supported by an affidavit.

It is contended that there is no evidence that the whole of the amounts of items 1 and 2 had been realised. Paragraph 70 of the defendant's affidavit in answer states as follows :—

"That with reference to paragraph 55 of the petition this defendant states that the different sums of money advanced by the late Raja Durga Prasad Singh were part of the Jheria Raj estate and are all entered in the *rokers* thereof, this defendant has realised some of these amounts and they have been duly entered in the *rokers*". It is contended on behalf of the plaintiffs that the statement that "the defendant has realised some of the amounts and they have been duly entered in the *rokers*" refers to the general statement made in the Rani's affidavit (paragraph 55) about the defendant having realised large sums of money and not to the two specific items (a) and (b) mentioned in the affidavit. It is not clear whether the admission refers to these two particular items.

But the defendant having stated that "some of those amounts had been realised and are duly entered in the *rokers*", the question as to how much has been realised may be ascertained from the *rokers*.

It was further contended by the defendant that assuming the decree against Maharaja Manindra Chandra Nandy was on account of royalty, we do not know the terms of the lease, and whether the royalties had been stipulated to be paid to the Raja and his *successors* and that the Court cannot deal with it without amendment of the plaint and without giving the defendant an opportunity of meeting the case. But although it was generally pleaded that everything was part of the Raj there was no suggestion that any money was payable to the *successors* of Raja Durga Prasad Singh. The plaintiffs alleged in the Receiver petition that the defendant had realised large sums due to Raja Durga Prasad and the defendant states that he had realised "some of those amounts". But assuming that there was any such stipulation it does not help the defendant as the plaintiffs are the successors of Raja Durga Prasad in respect of the self-acquisitions. "Successor" does not necessarily mean "successor by survivorship."

With regard to the item No. 3—one lac and thirty thousand rupees said to have been realised from the Raja of Barabhum, the plaintiffs relied upon a letter of Lalit Kishore to Mr. Macnair, dated the 4th November 1916. That, however, only shows that a decree had been obtained not that the money had been realised and there is no evidence that it has been realised.

It was pointed out that there are serious objections to a decree being passed for these items (Nos. 1 to 3) referred to above. Any application for amendment would raise the question of limitation and the jurisdiction of the Alipore Court to entertain the claim. We need not discuss these questions because there is no prayer for amendment. It is further contended that if these amounts are allowed, the value of the appeal would be increased. But no question of Court-fee would arise because the highest court-fee payable has been paid. As for the valuation of the appeal also, we do not see any difficulty. The appeal is valued at eighty lacs of rupees. There is no specification of the properties for which the appeal has been preferred, but it relates to the properties of schedule *Ka* which were valued at Rs. 60,77,000, and certain properties of schedule *Kha* which were disallowed by the Court below. The entire properties were valued at 90 lacs of rupees, so that deducting the value of properties of schedule *Ka* valued at 60 lacs and odd they claimed other properties of the value of about 30 lacs. They succeeded in the Court below to the extent of about 13 lacs and 42 thousand rupees leaving about 16 lacs of rupees for which they

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have appealed. So the valuation of the appeal would cover the amounts for which the plaintiffs are claiming.

Then it is contended that the cause of action for dispossession of immoveable properties is different from the cause of action for money had and received. The conversion which took place at the date of the death of Durga Prasad is different from the conversion subsequent to his death, and the plaintiffs could not sue the defendant until he had received the monies, that the suit for monies should have been brought in a Court where the cause of action arose or where the defendant resided. But the suit is for recovery of the impartible estate as well as other properties moveable, and immoveable, of which the defendant is said to have been in wrongful possession, and there is only one cause of action viz. the withholding of all those properties by the defendant and that would include the monies realised subsequent to the death of Raja Durga Prasad and prior to the institution of the suit.

With regard to the remaining items as also the various other sums of money alleged to have been realised, there is no evidence of realisation on the plaintiffs' side. But as stated above, the defendant admitted that some of those amounts mentioned in paragraph 55 of the plaintiffs' affidavit had been realised and duly credited in the *rokars*. So an enquiry will be made with regard to all these items by the Court below.

With regard to the cash in the Raj Treasury, the plaintiffs in the Receiver petition (paragraph 54), alleged that there was a large sum of cash in the iron safes of Raja Durga Prasad, amounting to about 3 lacs, which was his own absolute property, unconnected with the Jheria Raj estate, and was wrongfully taken possession of by the defendant. The defendant in his affidavit in answer (paragraph 69) stated that whatever cash there was in the cutchery had been entered in the inventory by Mr. Luby and subsequently divided between the plaintiffs and the defendant as stated in the deed of *bantannama*. The statement that whatever was in the cutchery was entered in Mr. Luby's inventory is not true, because admittedly some iron safes were not shown to him.

It is true that in the plaint the plaintiffs claimed that the cash in the *bahir tahabil* at the time of the death of Raja Durga Prasad was Rs. 26302 and the cash in the Treasury in the cash box and *nij* iron chest was Rs. 1,58,371 - 12 - 3, the latter being the sum mentioned in the *bantannama*. The Court below has also found that Rs. 1,34,531 - 10 was in fund of the estate on the date of the death of the Raja out of which Rs. 106879 was shown to Mr. Luby,

and there was the sum of Rs. 26302 in the Treasury. The said sum of Rs. 1,06,879 together with Rs. 51500 found in three unopened safes make up the sum of Rs. 1,58,379 which is claimed in the plaint. But the plaintiffs in the plaint stated that they had no accurate knowledge about the properties left by the Raja and prayed that they might be ascertained by discovery and included among the properties in suit. As stated above, in the Receiver petition they alleged that the Raja left about three lacs of rupees being his absolute property unconnected with the Raj estate. The defendant said that all the cash was entered in Mr. Luby's inventory which is not true. The Court below found that the cash in the Treasury was not shown to Mr. Luby, that Mr. Smith kept it back from him, and that Mr. Smith and the officers of the defendant went on spending money from the cash in the Treasury. Large sums of money must have been spent not only on the *Sradh* of Raja Durga Prasad and the "*Tika Pugges*" of the defendant, but very large sums of money were paid to the persons who helped the defendant in securing his succession to the estate.

Kalpada Roy, Cashier of the Raj since 1914 (formerly Rokar mohurrir), says that cash was kept in an iron safe in the Treasury room as well as in an iron safe under double lock, that there was a book to show how much money was kept under double lock which was opened on the day the name of the defendant was entered in the rokar. But he cannot say where that book is. He says that his *hath-khata* has been destroyed, that there was another *khata* which showed how much he had under double lock and has not been preserved. In these circumstances, we think an enquiry should be made as to how much cash was left by Raja Durga Prasad at his death.

With regard to the moveables (Nos. 24 to 83) some of which have been decreed to the plaintiffs, it is urged by the defendant that there is no evidence that they were acquired by Raja Durga Prasad.

It appears that the plaintiffs described the properties of schedule *Kha* as acquired during Raja Durga Prasads' time. The original schedule contained only the list of jewellery. The defendant did not dispute that the jewellery was acquired by Raja Durga Prasad. Subsequently, the plaint was amended on the 10th June 1919 by giving the values of the properties claimed separately, the jewellery being valued in a lump at one lac and a half of rupees. There was further amendment on the 16th June 1919 and then the moveable properties items Nos. 24 to 83 were added. The defendant put in

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an additional written statement on the 28th June 1919 in which he stated that some of the properties were missing from the time of Raja Rash Behari and other former Rajas and that the moveable properties in the schedule *Kha* were not properties acquired in the time of Raja Durga Prasad.

The Court below appears to have proceeded upon the basis of the list of moveables filed by the defendant when he was called upon to produce a list of the articles in his possession. We think that an enquiry should have been directed as to the moveables left by Raja Durga Prasad as his self-acquisitions and as to the value thereof.

Executor de son tort.

The plaintiffs claimed discovery and accounts from the defendant. In prayer *Gha* in the plaint they prayed as follows : " That defendant being in wrongful possession of all the properties left by the plaintiff's husband and as the plaintiffs do not possess accurate knowledge about them, and the defendant has special knowledge of them, they may be ascertained after discovery made by the defendant and included among the properties in suit, and a decree be passed declaring the plaintiffs' aforesaid right to them and giving them possession thereof".

The rath issue in the case was " Are the plaintiffs entitled to any discovery as prayed for by them". That issue, however, was not tried by the Court below, although it is stated on behalf of the plaintiffs that the shorthand notes of the arguments in the Court below show that the point was argued by the plaintiffs' counsel.

It is not contended that there should be further discovery by way of inspection or production of account books i.e. discovery by suit, but that if the plaintiffs have established their title to the self-acquisitions, they are entitled to discovery and accounts under the decree on two grounds.

(I) That the defendant was executor *de son tort*, and

(II) that he was the agent of the plaintiffs under the *Am-mukhtearnamah* obtained by him from them.

The first question, therefore, is whether the defendant is an executor *de son tort*. " If one who is neither executor nor administrator intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law, an executor of his own wrong or more usually an executor *de son tort* . . . A very slight circumstance of intermeddling with the goods of the deceased will

make a person executor *de son tort* (See Williams on Executors, 11th Edition Vol. 1 Page 177). The principle has been embodied in section 265 of the Indian Succession Act which lays down that "a person who intermeddles with the estate of the deceased or does any other act which belongs to the office of executor while there is no rightful executor or administrator in existence thereby makes himself an executor of his own wrong". There are no provisions similar to those of sections 265 and 266 in the Probate and Administration Act which therefore do not in terms apply to Hindu Wills, but in the case of *Rajah Parthasarathy v. Rajah Venkata-dri* (1) it was held that the doctrine of executor of his own wrong in the law of wills introduced in sections 265 and 266 of the Indian Succession Act is applicable to cases not governed by that Act on general principles of equity and good conscience even though similar provisions have not been introduced into the Probate and Administration Act. This is not disputed on behalf of the defendant.

"If, however, a person set up in himself a colourable title to the goods of the deceased though he may not be able to make out his title completely he shall not be deemed an executor *de son tort* (*Flemings v. Jarrat*) (2). See also *Rajah Parthasarathy v. Rajah Venkata-dri* (3), but the claim must be *bona fide* (page 231), so also if he takes the goods of the deceased by mistake supposing them to be his own, this will not make him executor of his own wrong" (See Williams on Executors page 182).

It is contended that the defendant has recognised the will, and has not only taken possession of the properties but has paid legacies under the *bantannama* and *khorposh* deeds, that the only reason why probate was not taken out, according to Lalit's evidence, was to avoid payment of a heavy probate duty, that the defendant did not take possession of the properties on the assertion of a paramount title, but as claiming from the testator Raja Durga Prasad, and that the mere fact that he may be the successor does not relieve him from being an intermeddler as he was doing something which would be the legitimate office of the executor viz. the payment of debts and legacies. It is contended, on the other hand, that the defendant did not pay the legacies as executor, that both parties claimed the estate, the defendant got possession under a claim of title and in his own right by survivorship, and that he paid the legacies out of his estate and not as legacies under the will, and the

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(1) (1922) 1. L. R. 46 Mad. 190 (232-233).

(2) (1794) 1 Esp. N. P. C. 336. (3) (1922) 1. L. R. 46 Mad. 190(228-229).

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payments therefore cannot be held to have been made as executor. But the mere fact that the defendant did not profess to act as executor does not relieve him from the liability, as an executor *de son tort* rarely professes to act as such. It is true that if a person claims a title not derived from the testator but a paramount title he does not make himself liable as an executor *de son tort*.

But in the present case, the *bantannama* deeds stated that the defendant had at first raised objections to the will as not binding upon him but eventually had given up those objections and agreed to give shares of the properties mentioned in the will in accordance with the wishes of the deceased as "*expressed in the said will*", and that the properties had accordingly been divided. In the *khorposh* deeds also, it was stated that "in accordance with the terms of the said will," the defendant had executed the deed promising to pay the *khorposh*. Whatever his attitude might have been originally, he recognised the will and gave effect to it under the deeds of *bantannama* and *khorposh*. It is true that a person taking possession of properties under a *bona fide* claim of title does not constitute himself an executor *de son tort*. But the position taken up by the defendant in the present case was not that there was no will or that the will was not valid. He not only did not repudiate the will, but adduced evidence to prove that the will was genuine, valid and effective. He relied considerably upon it to show what the intention of Raja Durga Prasad was with respect to the succession, and the incorporation of the self-acquisitions with the impartible Raj. Having done all this, and given legacies under the will in terms of the will, we do not think that he is entitled to say that what he did was as owner of the estate.

The payment of debts and legacies is characteristic of the office of an executor and the defendant paid the legacies under the terms of the will.

It is contended that the defendant was bound to pay the legacies as they were charged upon the estate; that had the plaintiffs obtained probate and sued him he would have had to pay, which would have been payment by a debtor, and similarly the payment amicably should be considered as payment by a debtor. But the will was not proved in the Probate Court, and unless it was proved, the legacies could not be enforced against the estate, even though they had been charged upon it.

It is next contended that the defendant even if liable as an executor *de son tort* to executors, administrators, creditors or legatees, are not liable to the plaintiffs. But an action for

administration, which means that the legacies and debts have to be paid off, may be brought by the next of kin (See Form No. 17, appendix D, Civil Procedure Code). It is next contended that the defendant was not sued as an executor *de son tort*, and that the plaintiffs having repudiated the will cannot set up a new ground of relief, and now ask the appellate Court to hold the defendant liable as executor *de son tort*. Reliance is placed upon the case of *Kali Das Chaudhuri v. Draupadi Sundari* (1), where the defendant who was sued as a partner pleaded that he was remunerated by a share of the profits, and an application by the plaintiff made to the Court of appeal to amend his plaint on the footing that the defendant was not a partner but a servant, as alleged by the latter, was refused on the ground that where a plaintiff bases his claim upon a specific legal relation alleged to exist between him and the defendant, he should not be allowed to amend the plaint so as to base it on a different legal relation.

In the present case, the plaintiffs alleged in the plaint that there was no will but that the defendant was in possession and that his possession was wrongful. The defendant, on the other hand, says that there was a will, and if he has in fact intermeddled with the estate it is sufficient, although he is not sued as executor *de son tort*: See *In re Lovett Ambler v. Lindsay* (2) where Malins V. C. observed "It has been argued that they are not sued as executors *de son tort*, because it is not stated upon the claim that they are executors *de son tort*; but that is not necessary, if it appears from the ordinary interpretation of the allegations that they have intermeddled with the estate." Then it is contended that sections 265 and 266 give only certain rights against the executor *de son tort*. But section 266 does not appear to be exhaustive, it deals with some of his liabilities and does not deal with all the rights and liabilities of an executor *de son tort*. In the case of *Coote v. Whittington* (3). Malins V. C. observed "I quite agree that if you file a bill against an executor *de son tort* for a general account, you cannot sustain it. He is executor *de son tort* if he has improperly received assets, and so far as you can state that he has received a particular asset he is liable, but not further. He is not liable to a general account unless he has received everything". So under section 266 of the

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(1) (1917) 22 C. W. N. 104.

(2) (1876) L. R. 3 Ch. D. 198 (205); 45 L. J. Ch. 768; 35 L. T. 93; 24 W. R. 982.

(3) (1873) L. R. 16 Eq. 534 (547); 42 L. J. Ch. 846; 29 L. T. 206; 21 W. R. 837.

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Indian Succession Act he is liable to the extent of the assets which might have come to his hands.

Lastly, it is pointed out that there is a difference between the English and Indian law, so far as the liability arising from taking possession of the estate of the deceased is concerned. But a person who takes possession of or intermeddles with the estate of a deceased person without being appointed an executor is an executor *de son tort*, and is liable both under the Hindu and English law. See *Magalhães v. Narayana* (1) and *Kanakamma v. Venkataramam* (2).

An executor though not a trustee for specific purpose (under section 10 of the Limitation Act) is a trustee with a fiduciary character even as regards the next of kin (See *Kherodemoney v. Doorgamoney* (3); *Greender Chunder Ghose v. Mackintosh* (4)).

In *Adair v. Shaw*, (5) the Lord Chancellor observed:—"If we advert to the cases on the subject, we shall find that trusts are enforced not only against persons who rightfully are possessed of the trust property as trustees, but also against all persons who came into possession of the property bound by the trust with notice of the trust, and whoever so comes into possession is considered as bound with respect to that special property to the execution of the trust".

With regard to the second ground viz that the defendant was the *Am-mukhtear*, it is not sought to make the defendant liable to account on the footing of an agent, but only to show that he stood in a fiduciary relationship to the plaintiffs.

Discovery.

With regard to discovery the plaintiffs say that so far as self-acquisitions are concerned the defendant being in wrongful possession and in possession of the books of account should give discovery as otherwise the plaintiffs cannot have knowledge of the monies which accrued due during Raja Durga Prasad's time and were realised by the defendant, and that an enquiry should be directed as to the self-acquisitions, moveables and the arrears of rents and royalties etc.—an enquiry in the nature of an enquiry into mesne profits.

The defendant says that the plaintiffs had discovery to which they were entitled, that the discovery which they claimed in the

(1) (1881) I. L. R. 3 Mad. 359 (363 and 365).

(2) (1884) I. L. R. 7 Mad. 586.

(3) (1878) I. L. R. 4 Calc. 455. (469); 3 C. L. R. 315.

(4) (1879) I. L. R. 4 Calc. 897. (924); 4 C. L. R. 193.

(5) (1803) 1 Sch. & Lef. 254 (262).

plaint was a discovery of properties left by Raja Durga Prasad and of discovery of monies realised after his death. In paragraph 13 of the plaint the properties which came down from Raja Jaimangal are referred to as mentioned in schedule *Ka*, and those acquired in the life-time of Raja Durga Prasad, in schedule *Kha*, and it was stated that the defendant having taken wrongful possession of them, knows all about them and he is bound to make a discovery of them. It is, accordingly, contended that the only discovery wanted was with respect to properties which came down from Jaimangal and those left by Raja Durga Prasad, and that there was no reference to monies which accrued due in his life-time but were realised by the defendant after his death. But in the earlier portion of the paragraph, the plaintiffs stated that they had no correct information as to the properties acquired in the life-time of their husband, the moveable properties, cash deposits in the Banks or money invested in the money-lending business which had been left by their husband. The discovery prayed for must refer to them also. The monies realised by the defendant after the death of Raja Durga Prasad were not specifically mentioned, but the "properties and money invested in lending business left by him," would include the monies realised by the defendant. It is true that when the plaintiffs amended the plaint they prayed that certain properties which their husband got from Raja Jaimangal should be added to schedule *Ka* of the plaint, and certain other properties acquired by their husband should be added to schedule *Kha*. But they did not profess to give a list of *all* such properties. They distinctly stated that they had prayed in the plaint that besides the properties mentioned in schedules *Ka* and *Kha* "other properties should be ascertained and included in the list of properties by causing the defendant to make a discovery thereof", and that they had been able to ascertain some properties which they wanted to add to the two schedules *Ka* and *Kha*. In the list of properties to be added to schedule *Kha* they mentioned "moveables" valued at one and a half lacs of rupees, but did not mention royalties and rents. But they did not give up the right to discovery as claimed by them in the plaint which related to all properties left by Raja Durga Prasad. It is contended that the issue "Are plaintiffs entitled to discovery as prayed for by them" refers only to properties which came down from Raja Jaimangal and those left by Raja Durga Prasad, and did not refer to royalties or rents etc. But that assumes that *properties left by Raja Durga Prasad* did not include the rents and royalties etc. realised subsequent to his death. We

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think that the contention of the defendant is based upon a narrow view of what was claimed in paragraph 13 of the plaint.

In the petition for appointment of a receiver the plaintiffs in paragraph 55 stated that the defendant since he obtained wrongful possession of the estate had realised large sums of money due by different persons to Raja Durga Prasad and specifically mentioned the sums realised from Maharaja Manindra Chandra Nandy, and the Tekait of Pathrol, and in paragraph 62 stated that the defendant was attempting to realise and misappropriate large sums of money still remaining unrealised out of the amounts due by various persons to their husband and some instances were specified. They prayed (d) that the defendant may be ordered to discover all moveable property wrongfully taken possession of by him and (e) that the defendant may be directed to produce all papers documents, vouchers, books of account and other papers and writings showing the moveable properties and cash left by the said Raja Durga Prasad and all income derived by the defendant after his death and all his dealings in connection therewith for the purposes of this application.

The prayers were comprehensive enough and there was express reference to all *income derived by the defendant after his death*. These go to show what the plaintiffs meant by discovery in paragraph 13 of their plaint. The compromise arrived at in connection with the application for appointment of a receiver does not show, as contended by the defendant, that the plaintiffs in any way gave up their claim to discovery as to the income. On the contrary, paragraph 5 of the terms of settlement provided "Defendant not to deal with any self-acquired and personal properties of Raja Durga Prasad moveable or immoveable in his possession except as otherwise provided herein", and paragraph 6 provided "Defendant to keep separate accounts of the properties acquired by Raja Durga Prasad and in his possession and the income thereof except as otherwise provided herein".

It is pointed out that the defendant was called upon to file an inventory and an inventory was filed on the 12th May 1920. Objection was taken by the plaintiffs that it was not a full and complete inventory, but no objection was taken that it did not set out the monies which had accrued due during the life-time of Raja Durga Prasad but were realised subsequently, whether on account of rents, royalties or money-lending business. The defendant by his petition stated that he had set out all that he considered were valuable properties. It appears however from order No. 140, dated

the 23rd June 1920 that there was a discussion before the Court whether the inventory was complete, having regard to the fact that it was only a list of properties in the possession of the defendant *since the date of the compromise*, and that it did not purport to be a list of the properties appertaining to the estate at the time the defendant took charge of it. The Court was of opinion that the latter question formed the subject of an issue, and was a controversial point and that putting a strict construction on the petition of compromise, the defendant undertook to file an inventory of valuable moveables in his possession at the time the compromise was entered into, and the Court ordered the defendant to furnish a complete list of moveables which the defendant was in possession of *from the time of the compromise*, and that if the list was considered incomplete by the plaintiffs they might move the Court to depute a commissioner for the preparation of a list. Accordingly, a full inventory was filed on the 12th July 1920, but no objection was taken that it did not include royalties, rents and money-lending business etc. It will be seen that no money was entered in the list. The expression "moveables" evidently was understood to mean moveable articles and not money (whether rents, royalties or money invested in money-lending business), and having regard to the order, dated the 23rd June 1920 directing the defendant to file a list of moveables which came into the possession *from the time of the compromise*, we do not attach any importance to the fact that no objection was taken to the non-inclusion of royalties etc.

The question is whether the plaintiffs abandoned their claim to discovery of all properties left by Raja Durga Prasad which we think includes rents, royalties and other monies left by him and subsequently realised by the defendant. As stated above, the plaintiffs in the Receiver petition referred to monies realised by the defendant after the death of Raja Durga Prasad and the prayer in petition expressly refers to all moveable properties and cash left by Raja Durga Prasad and all "income derived by the defendant after his death". So late as the 9th February 1922 while these appeals were pending in this Court Mookerjee and Cuming J. J. made an order (evidently at the instance of the plaintiffs) directing the defendant to forthwith deposit in this Court to the credit of the suit all such sums as may from time to time be realised by him out of the monies invested in the various money-lending businesses. We refer to the order only to show that the plaintiffs never gave up their claim to discovery.

In paragraph 70 of his affidavit in the Receiver matter (in answer to paragraph 55 of the plaintiffs' affidavit) the defendant

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stated that he "has realised some of these amounts and they have been duly credited in the rokars". This again shows that the plaintiffs were claiming the monies realised after their husbands' death.

It is pointed out that the defendant produced the *rokars* from 1300 to 1322 (1894 to 1916) along with his written statement. Those for 1323-25 were filed on the 12th July 1919 and the *potea rokar* of 1326 was filed on the 14th April 1919.

But the Court below did not touch the 12th issue at all and no enquiry appears to have been made with reference to the monies (rents, royalties, money-lending business or other monies) except the cash in the Treasury and in the Bank. We think that, in these circumstances, there should be an enquiry into the moveable properties left by Durga Prasad including arrears of rents, money—lending, royalties and monies realised by the defendant after his death and the value of the moveable properties.

At the time of our giving directions in the ordering portion of the judgment, the plaintiffs contended that the Court below should be directed to fix the maintenance to which the plaintiffs are entitled. They say that they are entitled to maintenance out of the estate. In the written statement the defendant stated that they could "only claim *khorposh* according to long standing custom". But before us it is contended by the defendant that the plaintiffs are not entitled to it as they are getting a large amount of property besides the *moqarrari* grant made to them by Raja Durga Prasad. There was no claim for maintenance made in the plaint nor was the question argued before us at the hearing of the appeal. In these circumstances, we do not decide the question in the present suit and it is left open.

Both the appeals are accordingly, partly allowed the result being—

(i) that the decree of the Court below in so far as it disallows the claim of the plaintiffs to the impartible estate Jheria (property No. 1) and the immoveable properties Nos. 2 to 7 of schedule *Ka* and properties Nos. 9 to 19 of schedule *kha* of the plaint will be confirmed.

(ii) that the decree of the Court below in so far as it allows the claim of the plaintiffs to the immoveable properties Nos. 1 to 8 of schedule *kha* of the plaint will be confirmed.

(iii) that the plaintiffs will get mesne profits of the properties Nos. 1 to 8 of schedule *kha* as directed by the Court below ;

(iv) if as a result of the enquiry any other immoveable property be found to have been acquired by Raja Durga Prasad, the plaintiffs will get the same together with the mesne profits thereof ;

(v) (a). in addition to the money in the Bank with interest thereon as allowed by the Court below, the plaintiffs will get interest upon the said money at 6 per cent per annum from the dates of the withdrawals from the Bank up to the institution of the suit (the lower Court having allowed interest *from* the date of institution of the suit) : and the plaintiffs will also be entitled to the interest upon the 2 lacs and fifty thousand rupees paid to the plaintiffs in the Court below between the date of the institution of the suit up to the date or dates of payment thereof to the plaintiffs ;

(b). in addition to the amount in cash allowed by the Court below, the plaintiffs will get the sum of Rs. 48249-3-9 pies which was disallowed by the Court below—together with interest thereon at 6 per cent per annum from the 7th March 1916 ;

(c) the plaintiffs will get all rents and royalties which fell due during the life-time of Raja Durga Prasad, and all monies on account of mortgages and the money-lending business of Raja Durga Prasad (including the sums realised from Maharaja Manindra Chandra Nandy) which have been realised by the defendant after the death of Raja Durga Prasad up to the date of institution of the suit together with interest thereon at 6 per cent from the dates of such realisations. The defendant will be entitled, however, to get a deduction of the costs of realisation of the same, the income-tax, super-tax and other public charges which may have been paid by the defendant on account of such sums (whether paid before or after institution of the suit). The Court below will consider what proportion of the total cost of realisation (including costs of management) was incurred by defendant in respect of such sums of money as are referred to in this clause (c). The defendant will also be entitled to get a deduction of any shop debts and other outstanding bills and debts of Durga Prasad paid by the defendant otherwise than for the estate and the properties mentioned in paragraph (i) above, up to the institution of the suit ;

(d) the plaintiffs will get all moveable properties and cash [in addition to the jewellery and cash and the monies decreed to the plaintiffs by the Court below and the sum of Rs. 48249-3-9 pies dealt with in paragraph (b) above], left by Raja Durga Prasad which came into the hands of the defendant. The plaintiffs, however, will not be entitled to such moveables or furniture as are appurtenant to the Raj as found by the Court below and in respect of which the plaintiffs' claim has been disallowed by the Court below.

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(vi). there will be an enquiry as to the value of the jewellery allowed by the Court below to the plaintiffs : there will also be an enquiry as to which of the moveable properties Nos. 24 to 83 were left by Durga Prasad, and the plaintiffs will get a decree for such of them as may be found to have been left by Raja Durga Prasad or the value thereof and the jewellery or the value thereof to be fixed by the Court ;

(vii). the defendant will give discovery relating to the above matters, except with regard to moveable properties already included in Exhibit Z 270 and monies, rents and royalties which appear in the rokars already on the record ;

(viii). the defendant will pay from the 1st August 1925, Rs. 300 per month to each of the three plaintiffs until final disposal of the case by the Court below, (such amount to be deposited in the Court below). The defendant will get credit for such amounts against the amount which will be payable by him to the plaintiffs ;

(ix). each party to bear its own costs in both Courts. The paper-book costs will be taxed by the Taxing Officer and apportioned between the plaintiffs and the defendant and the defendant will recover from the plaintiffs two-thirds of the costs of the papers included in the plaintiff's lists in both the appeals, which had been advanced by him, and the amount of such costs will be set off (in part) against the amount which may be payable by him to the plaintiffs.

The defendant gives an undertaking through his pleaders that he will not disturb the plaintiffs' residing in the house they are occupying until the final disposal of the case.

The plaintiffs give an undertaking through their pleaders not to withdraw the sum of Rs. 2 lacs in deposit with the Registrar, High Court, Appellate Side without giving security at any time before the 30th November 1925.

The state of things as ordered by this Court on the 9th February 1922 as modified by the order of His Majesty in Council, will continue until 30th November 1925.

The case will go back to the Court below for making the enquiries referred to above (which are to be completed within four months of the arrival of the judgment and decree there) and for disposal of the case according to law, having regard to the directions made above.

Let the records be sent down as soon as the decree is signed and the taxation of paper-book costs is made.

A. T. M.

Appeals allowed in part: Case sent back.

*Before Sir John Woodroffe, Knight, Judge, and Sir Asutosh
Mookerjee, Knight, Judge.*

KHOSAL CHANDRA DAS

v.

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February, 20.

*Ejectment—Notice to quit—Month of tenancy—Holding over after expiry of
term of lease—Rent payable in four instalments.*

A notice to quit, when a tenant is holding over after the expiration of a lease for a term of years, should end with a month of the tenancy, whether the tenancy be considered from month to month or a tenancy from year to year.

The defendant held under a lease for 9 years, commencing on the 6th of Assar, 1300, agreeing to pay rent in four instalments viz in Assar, Aswin, Pous and Chaitra every year. The tenant continued in occupation after the expiry of the lease. A notice was served in June 1909 (Jaistha 1316) calling upon him to relinquish the land by the end of Chaitra 1316. A second notice was given on the 20th Bhadro 1317 requiring him to vacate at the end of Aswin :

Held, that the notices were not valid, as they did not require him to quit on the expiry of a month of tenancy: the notices should state that the tenancy would expire after 5th Assar.

Appeal by the Defendant.

Suit for ejectment.

The material facts appear from the judgment of Newbould, J :

The primary Court decreed the suit which was reversed on appeal. This decree was reversed on second appeal by the following judgment :

Newbould, J : This appeal arises out of a suit for ejectment. The Court of first instance granted a decree to the plaintiff. On appeal the learned Subordinate Judge has dismissed the suit on the ground that the notice to quit served on the defendant was bad in law. The notice in question was served on the 20th Bhadra 1317 requiring the tenants to vacate at the end of Aswin. The learned Subordinate Judge has held that as the defendants were holding on a lease which was executed on the 6th of Assar the last day of the month of tenancy must be held to be the 5th day of each month.

I am unable to agree with this finding. The original lease provided that the tenant should take the land for 9 years at an

*Letters Patent Appeal No. 36 of 1916, against the decree of Mr. Justice Newbould, dated the 12th January, 1916 in Appeal from Appellate Decree No. 369 of 1914, reversing that of Babu Ramesh Chandra Sen, Subordinate Judge, 1st Court, of Backergunge, dated the 1st November, 1913, reversing that of Babu Kunja Behari Roy, Munsiff, 7th Court, at Barisal, dated the 7th September, 1912.

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annual *jama* of Rs. 6 and should pay the *jama* each year according to the instalments described in the schedule to the lease, that is instalments of Rs. 1-8 payable respectively in the months of Assar, Aswin, Pous and Chaitra. It is obvious from the terms of the lease that the parties meant that the lease should be for 9 years ending on the last day of Chaitra 1308. When the tenant held over he did so as a monthly tenant and the provisions for payment of rent at the end of each 3rd Bengali month indicates that the tenancy then became one from month to month expiring on the last day of each month. It has been found that the notice was duly served more than 15 days before the date fixed for the vacation of the land as required by section 106 of the Transfer of Property Act. Its effect was therefore to terminate the defendants' tenancy. Before the lower appellate Court, one other ground of appeal was urged. That was that the compensation allowed to the defendants, the appellants in that Court, was very inadequate. But that appeal was decided in the defendants' favour on the first point no finding was come to on the question of compensation. It would be to the interest of the parties if they had allowed me to decide this small point. But although the appellant is willing to make some concession to avoid a remand the respondents insist that this point must be determined by the Court below.

I accordingly decree this appeal. The plaintiff will get khas possession of the land in suit by evicting the defendants on payment of such compensation as may be fixed by the lower appellate Court after deciding whether the compensation awarded by the Munsiff is adequate or not.

As the appeal is decreed and the decree of the lower appellate Court set aside the appellant will get his costs in this and in the lower appellate Court.

Against this decree, the defendant appealed under section 15 of the Letters Patent.

Babu Upendra Kumar Roy for the Appellant.

Dr. Dwarka Nath Mitter for the Respondent.

The judgments of the Court were as follows:—

February, 20.

Woodroffe J:—The question which has been argued in this appeal is that the learned Judge erred in holding that the notice on the defendant to quit was sufficient and valid in law.

The lease was one for nine years, commencing on the 6th of Assar 1300. Therefore, it expired on the 5th of Assar 1309. Then the tenant continued in occupation after the expiry of the lease—whether that was a tenancy from month to month or a tenancy from

year to year makes no difference as in either case the notice must end with a month of the tenancy which is not the case here. It has been suggested that the tenancy had already terminated on the ground that Nobin's right had come to an end in 1316 by notice served on him. But this contention is open to the same objection, in that it appears from the judgment of the first Court that the notice which was served in June 1909 (Jaistha 1316) called upon him to relinquish the land by the end of Chaitra 1316. It cannot I think be contended, as it is sought to do that there was no heritable interest; for no issue to this effect was raised in this suit. I must hold, therefore, that the notice was not a valid notice, and reverse the decision under appeal and restore the judgment and decree of the Subordinate Judge.

The appellant is entitled to the costs of the hearing both before us and before Mr. Justice Newbould.

Mookerjee J :—I agree.

A. T. M.

L. P. Appeal decreed.

*Before Sir Ewart Greaves, Knight, Judge, and
Mr. Justice Cuming.*

JABED ALI TALUQDAR AND OTHERS

v.

SURENDRA NATH BANDOPADHAYA AND OTHERS,*

Rent suit—Bengal Tenancy Act (VIII of 1885). Sec. 158B—Notice to co-sharer landlords—Effect of non-service of notice—Sale, if free from encumbrances—Ijaradar, if representative of his lessor—Equitable estoppel.

Section 158B of the Bengal Tenancy Act requires that in order to sell a tenure by one or more co-sharer landlords all the remaining co-sharer landlords should be made parties to the suit, and also that when one or more co-sharer landlords having obtained a decree in a suit properly framed

*Letters Patent Appeal No. 32 of 1924, against the decision of Mr. Justice B. B. Ghose, dated the 31st July 1924, in Appeal from Appellate Decree No. 1195 of 1922, against the decree of Babu Narayan Chandra Ghose, Additional Subordinate Judge of Backerganj, dated the 17th February, 1922, reversing that of Babu Sachi Kanta Ray, Munsiff, 1st Court, of Patuakhali, dated the 22nd July, 1920.

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applies for execution of a decree by the sale of the tenure, notice of the application for execution should be given to all the co-sharers. This obligation of serving notice on co-sharer is not sufficiently carried out by serving notices on some of them.

The special provision of the Bengal Tenancy Act which allows one or more co-sharer landlords to sell a tenure or holding in execution of their decree must be strictly followed in order to give complete title to the auction-purchaser and it will not be sufficient to say that the ijaradar under a particular co-sharer was a party in other capacity being himself a co-sharer in the zemindari and therefore the absent co-sharer was sufficiently represented in order to bring into operation the special provisions laid down in section 158B of the Bengal Tenancy Act.

A taluk was held by A under several co-sharer zemindars. The plaintiffs were the proprietors of the zemindari to the extent of one anna odd share. They brought a suit for rent against A for their share of the rent of the taluq and in execution purchased it on the 21st September, 1909. X, another co-sharer zemindar brought a suit on the 15th April, 1910 for the entire rent due on account of the taluq but Y another co-sharer zemindar was not made a party. Y purchased a share of the zemindari on the 27th November, 1909, but his name was not registered under the Land Registration Act till 19th August 1910. Y gave a lease of his zemindari to Z the son of the plaintiff No 1. Z was made a party in the suit of X both as a co-sharer and as an ijaradar. X in execution of his decree sold the taluq, which was purchased by defendant No. 2 on the 9th March, 1911 :

Held, that the sale in execution of decree held by X did not entitle the purchaser to hold it free from all encumbrances owing to absence of notice to Y.

That Y was not sufficiently represented in the suit of X by his ijaradar

That Y was the owner from the date of his purchase.

That there was no duty cast upon the plaintiffs who were made *pro forma* defendants in the suit by X, of stating the incumbrance at the time of the sale to the intending purchaser.

That as the ijaradar was on the record in X's suit not merely as a co-sharer zemindar but also as an ijaradar of Y, he would be estopped from asserting in the present suit that the sale in execution was not a sale free from incumbrances. By the doctrine of equitable estoppel his standing by and allowing the purchaser in believing that he was purchasing the taluq free from all encumbrances, precluded him from now asserting in the present proceeding that the decree in X's suit was not a rent decree and that, therefore, the sale in execution was not a sale free from encumbrances

Appeal by the Defendants.

Suit for rent.

The material facts appear from the following judgment :

B. B. Ghose, J : This is an appeal by the plaintiffs and it arises out of a suit for rent with regard to a howla which is

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situated within a taluk under a zemindari. The defendants Nos. 1 and 2 are tenants of the howla. But the real question in dispute is between the plaintiffs and the defendant No. 9 as to the title to the superior taluki interest which the plaintiffs claim. The Court of first instance passed a decree in favour of the plaintiffs. On appeal by the defendants Nos. 1, 2 and 9 the decision of the munsiff was reversed by the Subordinate Judge and the suit has been dismissed. The plaintiffs appeal to this Court, and their contention is that on the facts found the plaintiffs are entitled to the rent claimed from defendants Nos. 1 and 2 and the defendant No. 9 has not acquired the superior title in the taluk of the plaintiffs by virtue of his purchase of the taluki interest.

The facts stand thus :—There was a taluk called Abdul Kasim the owner of which was one Akimanissa Bibi. This taluk was under the zemindari of which there are several co-sharers. The plaintiffs were the proprietors of the zemindari to the extent of one annā odd share. They brought a suit for rent against the lady Akimanissa for their share of the rent of the taluk Abdul Kasim and put the taluk to sale and purchased it themselves on the 21st September 1909. One of the co-sharers of the zemindari was the Nawab of Dacca. In the year 1910 he brought a suit for the rent of the taluk, Abdul Kasim and it appears that he purported to have framed his suit under section 148 A of the Bengal Tenancy Act for the entire rent due on account of the taluk. Then the Nawab executed the decree and had the taluk sold. It was purchased by the defendant No. 8 in the name of defendant No. 7 and the defendant No. 9 subsequently purchased it at a sale *inter vivos* from defendant No. 8.

The question in controversy turns upon the effect of the sale in execution of the Nawab's decree which was held on the 9th March 1911.

It is contended on behalf of the plaintiffs that this sale did not affect the interest which he had purchased in 1909. On the other hand it is contended by defendant No. 9 that the sale by the Nawab was under section 158B of the Bengal Tenancy Act and it is the entire interest in the taluk Abdul Kasim free from all incumbrance which was purchased by the auction-purchaser and therefore the plaintiffs had no title which would be effective as against the title of defendant No. 9 under the auction sale of the 9th March 1911.

Two points were raised by the defendants in their appeal before the Subordinate Judge. The first point was :—Was the sale held at the instance of the Nawab of Dacca and his co-sharers a rent sale

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or not? and secondly :—Did the conduct of the plaintiffs respondents in attaching the sale proceeds in execution of the decree held at the instance of the Nawab and his co-sharer and in appearing in that case in which the decree was being executed as a rent decree estop them from questioning the sale as a rent sale and the decree as a rent decree? The learned Subordinate Judge has decided both the points against the plaintiff. The controversy is with regard to the fact that one co-sharer, Golam Ajam by name, of the zemindari was left out in the execution proceeding of the rent decree of the Nawab. Section 158 B requires that in order to sell a tenure by one or more co-sharer landlords all the remaining co-sharer landlords should be made parties to the suit, and also that when one or more co-sharer landlords having obtained a decree in a suit properly framed applies for execution of a decree by the sale of the tenure notice of the application for execution should be given to all the co-sharers. If Golam Ajam was really a co-sharer in the zemindari then the execution sale by the Nawab could not have given the auction-purchaser a title free from all incumbrance, because admittedly Golam Ajam was not a party either in the suit nor was any notice of the execution proceedings given to him. The trial Court found that Golam Ajam was a co-sharer in the zemindari. It is contended by the learned vakil for the respondents that the effect of the finding of the Subordinate Judge is that Golam Ajam was not a co-sharer. The kabala by which Golam Ajam purported to have purchased 1 kara share in the zemindari is dated 27th November 1909. The Subordinate Judge deals with the question in this way and it is necessary I think to quote some passages from his judgment :—"The important question therefore arises whether Golam Ajam was a necessary party in the rent suit. Golam Ajam does not come forward"; again "Golam Ajam gave ijara of his 1 kara share to plaintiff No 1's son (Hari Prosad's son). Hari Prosad must have been the ijaradar though the deed might have been in the name of one of his sons. It is clearly proved that Hari Prosad was in possession of the share as ijaradar of Golam Ajam." Then lower down, "The said sale and decree cannot but be a rent sale and decree as Hari Prosad as co-sharer as well as ijaradar of Golam Ajam was a party in the case." Upon these findings he comes to the conclusion "I therefore hold that the sale in question was a rent sale." The finding is clear that Golam had a share which was given in ijara. There is however another passage where the Subordinate Judge has said this. "It can be safely inferred therefore that Golam Ajam was no proprietor before and he was no necessary

party in the Nawab's rent suit." This observation of the Subordinate Judge is probably with reference to the fact that Golam Ajam's name was not registered under the Land Registration Act till 19th August 1910 and the rent suit of the Nawab was brought on the 15th April 1910. It seems to me that the Subordinate Judge was in error in thinking that although Golam Ajam had purchased a share in the zemindari because his name was not registered under the Land Registration Act he should be considered as no proprietor till his name was registered. The special provision of the Bengal Tenancy Act which allows one or more of co-sharer landlords to sell a tenure or holding in execution of their decree must be strictly followed in order to give complete title to the auction-purchaser and it will not be sufficient to say that the ijaradars under a particular co-sharer was a party in another capacity being himself a co-sharer in the zemindari and therefore the absent co-sharer was sufficiently represented in order to bring into operation the special provisions laid down in section 158 B of the Bengal Tenancy Act. In my opinion therefore the special provision of the Bengal Tenancy Act not having been followed in the rent execution case by the Nawab the auction-purchaser did not purchase the holding free from all incumbrance and the interest which the plaintiffs acquired by their purchase in 1909 was not affected by the subsequent sale.

Then comes the question as regards estoppel. I feel great difficulty in understanding how the Subordinate Judge comes to the conclusion that the plaintiffs are precluded from asserting their title in the property. It is contended by the learned vakil for the respondents that it was the duty of the plaintiffs to give notice of the fact that all the co-sharers in the zemindari had not been made parties in the rent suit or had not been served with notice of the execution under section 158B as the plaintiffs had appeared in the suit and in the execution proceedings before the Court. I cannot see that there was any duty cast upon the plaintiffs who were made pro forma defendants in the suit to give notice to intending purchasers that the rent suit of the Nawab or the execution sale or the proceedings in execution were not such as to confer title on the purchaser as contemplated under the special provision of the Bengal Tenancy Act. If there was no such duty cast upon him his silence could not have influenced the conduct of the auction-purchaser in any way, and it cannot be said that the plaintiffs are estopped by this conduct of their in asserting their title.

It is next urged that the plaintiffs are precluded from asserting

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their interest by reason of the fact that they had attached the surplus sale proceeds of the execution sale under the Nawab's decree. But they did not draw out the money, and the mere fact that they had attached the surplus sale proceeds in order to satisfy any decree obtained by them but did not proceed further cannot preclude them from claiming title to the property. It is then urged by the learned vakil for the respondents that the plaintiffs had abandoned the title acquired by their purchase in 1909 because they had subsequently brought a suit for rent against Akimanissa Bibi in 1911 for the period subsequent to the date of sale. It appears that the sale of the plaintiffs was confirmed in 1913. Under the new Code under section 65 there is no doubt that the title of the purchaser vests from the time of the sale. But apparently, the parties were under the impression that till confirmation the plaintiffs' title had not been completed and that seems to have been the impression in the mind of the Subordinate Judge also. In any case however this question of abandoning the right of the plaintiffs was not raised in the Court of appeal below, and I do not think that it would be proper to allow the defendants to raise this question in second appeal for the first time. An endeavour was made by the learned vakil for the respondents to argue that the plaintiffs' conduct amounted to fraud. But no question of fraud was raised either in the Court of first instance or in the Court of appeal.

On these grounds I am of opinion that the judgment and decree of the Subordinate Judge dated the 17th February 1922 should be set aside and those of the Munsiff restored with costs in this Court and in the Court below.

Against this decision, the defendants appealed under section 15 of the Letters Patent.

Babu Jatindra Nath Sanyal for the Appellants.

Mr. Gunada Charan Sen and *Babu Prosanto Bhusan Gupta* for the Respondents.

The judgments of the Court were as follows :

Greaves, J :—This is an appeal under clause 15 of the Letters Patent from a decision of Mr. Justice Bspin Behari Ghose dated the 31st. July 1924. The appeal is by the defendants ; Mr. Justice Ghose having reversed the decision of the lower appellate Court which was in favour of the defendants. The suit was brought for rent of a howla, and the facts are as follows. The respondents who are the plaintiffs in the suit claimed one anna and odd share in a zemindary. In the zemindary there was a taluq Abdul Kasim and

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in the taluq there was a howla which was held by the tenant defendants. As I have already stated the suit was a suit for rent of the plaintiffs' share in the howla. The plaintiffs' story was that in the year 1906 they commenced a suit for rent of their share of the taluq, that they obtained a decree in that suit and that in the execution proceedings they brought one anna odd share of the taluq. The sale was confirmed in the year 1913. Meantime on the 27th September 1909 one Golam Ali Choudhury had purchased a share in the zemindary. The purchase, however was not registered until 19th August 1910 and before that date, namely, on the 15th April 1910 the Nawab of Dacca who was a co-sharer in the zemindary commenced a suit for his share of the rent of the taluq. He made the other co-sharers parties and consequently, if all the co-sharers were on the record the decree which he had obtained on the 14th August 1910 was a rent decree which could be executed as such. The Nawab of Dacca proceeded to execute his decree and in March 1911 the property was sold in execution of the rent-decree, if it was a rent decree, in the presence of the present plaintiffs as the Courts have found. This sale was confirmed on the 24th May 1911. Now the position is that if all the co-sharers were parties to the Nawab's suit and had also notice of the execution proceedings the sale of the appealing defendants would be free from any incumbrance in favour of the plaintiffs by virtue of their purchase in 1909.

Five points have been raised before us in this appeal. It is stated that Mr. Justice Ghose was wrong in holding that Golam was a proprietor. Mr. Justice Ghose so held; and the result is that if this finding is correct the sale in execution of the Nawab's decree was not a sale free from encumbrance. We think that the decision of Mr. Justice Ghose on this point is correct and that Golam was a proprietor by virtue of his purchase and that the sale in execution was not a sale free from all encumbrances. This also disposes of the second point that if Golam was the proprietor then as he was not registered until 19th August 1910 he was not a necessary party. I agree with Mr. Justice Ghose's conclusion that he was a necessary party as he was the owner from the date of his purchase.

Thirdly, it was urged that if Golam was a necessary party he was sufficiently represented by his ijaradar who according to the findings of the subordinate Judge was the father of Surendra Nath Banerji and who according to the same finding was on the record in the Nawab's suit both as a co-sharer in the zemindary and as an ijaradar. We agree with Mr. Justice Ghose that Golam was not

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sufficiently represented by his ijaradar and that the matter is not cured by this.

Fourthly, it was urged that in any case it was sufficient that the notice was served on some of the landlords and not on all and reliance was placed on the decision in the case *Rajani Kanta v. Sheikh Rahaman* (1). This seems to us to be a decision which depends upon the facts of the case and cannot be taken as having laid down any principle of law. We do not think that the obligation of serving co-sharers is sufficiently carried out by serving notices on some of them.

Then comes the fifth point which is really the main question before us and which is a question of estoppel. What is urged before us on behalf of the appellants is that assuming that Mr. Justice Ghose was right in finding that the decree obtained by the Nawab was not a rent-decree and that the sale in execution to the present appellants was not a sale free from all encumbrances under the circumstances of the present case by the doctrine of estoppel the plaintiffs are precluded from setting up this contention. Mr. Justice Ghose has negatived this contention and he has held that the mere fact that the plaintiffs were on the record in the Nawab's suit as co-sharers did not involve on them any obligation of stating the facts to the purchaser. I agree with him in this conclusion and I do not think that the mere fact that the plaintiffs as co-sharers were on the record in the Nawab's suit involved any obligation on them of stating the encumbrance at the time of the sale. But that does not, in my opinion, dispose of the case. If the defendants knew the facts and stood by and allowed the present appellants to purchase on the basis that the Nawab's decree was a rent-decree and that the sale in execution was not, therefore, a sale free from encumbrance then we think that they would be debarred from setting up in these proceedings that it was not a rent-decree. Consequently, what really we have to ascertain is what was the state of the knowledge of Surendra Nath Banerji's father at the time of the execution proceedings in the Nawab's suit. Mr. Justice Ghose has not considered that position. But according to the findings of the learned Subordinate Judge which findings whether correct or not, are binding on us. The father of Surendra Nath Banerji, Hariprosad Banerji, was on the record in the Nawab's suit not merely as a co-sharer zemindar but also as an ijaradar of Golam. It follows from this finding that Hariprosad must have known that Golam was a co-sharer at the time of the execution proceedings and,

(1) (1922) 27 C. W. N. 765.

therefore, a necessary party to the Nawab's suit and assuming this position which we are bound to assume from the findings of the Subordinate Judge we think that he would be estopped by this fact from now asserting in these proceedings that the sale in execution of the Nawab's decree was not a sale free from encumbrance. It has been urged before us that the ijara was not created until 9th April 1914 and that consequently, at the time of the proceedings in the Nawab's suit Hariprosad could not have been on the record as an ijaradar and we were asked to rely on an affidavit which is before us and notice of which was given to the present appellants in the proceeding before Mr. Justice Ghose. But we cannot in second appeal go into the question of facts of this nature and we must accept the finding of fact of the lower appellate Court and on this finding for the reasons which I have indicated Hariprosad knew at the time of the execution proceedings in the Nawab's suit that what the appellants were purchasing was not free from encumbrance. By the doctrine of equitable estoppel his standing by and allowing the purchaser in believing that he was purchasing free from encumbrance precludes him from now asserting in this proceeding that the decree in the Nawab's suit was not a rent decree and that, therefore, the sale in execution was not a sale free from encumbrance.

This, therefore, disposes of the appeal which must succeed on the 5th ground which was urged before us, namely, the ground of estoppel.

There is one thing that we ought to mention, namely, that it was urged before us that there could be no estoppel against the statute. That proposition is perfectly true but has no application to the present case.

The appeal, accordingly, succeeds. The decision of Mr. Justice Ghose is set aside and that of the lower appellate Court is restored.

The appellants will be entitled to their costs in this Court and before Mr. Justice Ghose and in the lower Courts.

Cuming, J.:—I agree.

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L. P. Appeal allowed: Suit dismissed.

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*Before Sir Ewart Greaves, Knight, Judge, and
Mr. Justice M. N. Mukerji.*

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JASODA SUNDARI (ALIAS PRAVABATI) CHAUDHURANI

v.

LAL MOHAN BASU AND OTHERS.*

*Presumption—Hindu Law—Dayabhaga School—Joint family—Father and son
—Property acquired in the name of son.*

The presumption in Hindu law that in joint family governed by the Dayabhaga School, that while a family remains joint, all properties including acquisitions made in the name of individual members are joint property, does not apply in the case where the family at the time of the acquisition consisted of father and his sons: *Rama Nath v Kusum* (1) followed. *Sarada v. Mahananda* (2) explained.

"Where the question is whether property standing in the name of the junior member of a Hindu joint family is his self-acquisition, the criterion is to consider from what source the money comes with which the purchase money is paid. Therefore in the absence of evidence that the junior member had any separate funds or that the property in question was purchased with money belonging to him the presumption is clear and decisive that it was acquired by the head of the family in the name of the junior member and that it was not the self-acquired property of the junior member." *Parbati v. Raja Baikuntha* (3). This presumption applies to a family governed by the Dayabhaga School of Hindu law as also to such a family consisting of a father and his sons.

Appeals by the Plaintiff.

Suits for rent.

The material facts appear from the judgment.

Babu Anilendra Nath Roy Chowdhury for the Appellant.

Babu Pyari Mohan Chatterji for the Respondent.

The judgments of the Court were as follows :

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Mukerji, J: These three appeals arise out of three suits for rent wherein the plaintiff claims 8 annas share of rent due for three holdings making the tenants principal defendants and the other 8 annas co-sharers pro-forma defendants. The suits were decreed by the Court of first instance and after several interlocutory proceedings were dismissed by the learned Subordinate Judge on appeal.

*Appeals from Appellate Decrees Nos. 936 to 938 of 1923, against the decrees of Babu Pasupati Basu, Subordinate Judge of Khulna, dated the 31st October 1922, reversing those of Babu Bhabataran Mukerjee, Munsiff, 1st Court, at Bagerhat, dated the 29th July 1921.

(1) (1906) 4 C. L. J. 56.

(2) (1904) 1. L. R. 31 Calc. 448.

(3) (1913) 19 C. L. J. 139.

One Kali Kumār Bose had two sons Kailas and Ram. The original plaintiff was the widow of Ram. The co-sharer landlords, pro forma defendants, are the heirs of Kailas. The properties in suit were acquired during the life time of Kali Kumar in the name of Kailas. Kali Kumar died in the year 1893 and the properties are said to have been acquired between 1880 and 1886. Two of these properties were acquired in the name of third parties and they subsequently executed deeds of release in respect of them in favour of Kailas.

The question which arises in these appeals is as to whether the properties were those of Kali Kumar or of Kailas and that is the sole point of controversy in these appeals.

In deciding this point the learned Subordinate Judge held that the onus of proving that the properties were those of Kali Kumar lay upon the plaintiff, and being of that opinion he thought that the plaintiff had failed to discharge that onus and in that view of the matter he dismissed the plaintiff's suits.

The question of *onus* is intimately connected with one or other of the presumptions of Hindu Law which are relevant to a case of this description. It has been argued before us on behalf of the appellant that in dealing with this question of onus the learned Subordinate Judge was in error. The properties having been acquired during the life time of Kali Kumar when Kali Kumar and his sons Kailas and Ram were members of a joint family governed by the Dayabhaga School of Hindu Law and there being nothing to show that Kailas had separate funds, it is urged, that it should have been held that Kali Kumar was the owner of the properties and it was for the defendants to prove that Kailas had any separate funds out of which the acquisitions were made.

On behalf of the respondents it has been argued that this presumption does not arise in a case in which the members of the family are the father and his sons and reliance has been placed on their behalf upon the decision of this Court in the case of *Sarada Prosad Ray v. Mahananda Ray* (1). The head note of that case runs in these words "The presumption of law that while a Hindu family remains joint all property including acquisitions made in the name of individual members is joint property, does not apply to the case of a joint family governed by the Dayabhag". As has been pointed out in the case of *Rama Nath Chatterjee v. Kusum Kamini Debi* (2) the head note of the case of

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Sarada v. Mahananda (1) to which I have referred is misleading. All that that case decides is that under the Dayabhag a family consisting of father and his sons cannot be regarded a joint Hindu family in the technical sense and consequently the presumption referred to in the head note quoted above does not apply to such a family. On a reference to the observations contained in page 451 of the case of *Sarada v. Mahananda* (1) it is clear that in that case the family consisted of a father and his sons and the contention that was put forward in that case was that all the properties acquired by a member of a joint Hindu family are properties of the family as a whole and the learned Judges observed that that presumption put in the way in which it was formulated before them by the learned vakil appearing for the respondent in that case could not be taken as correct in all circumstances and that it would not arise in a case in which the father and the sons form members of a joint family governed by the Dayabhag School of Law. Ordinarily in other cases of joint family governed by the Dayabhag School the presumption of Hindu Law that while a family remains joint all properties including acquisitions made in the name of individual members is joint property does apply. See the case of *Rama Nath Chatterjee v. Kusum Kamini Debi* (2) and the other cases cited in the judgment of this Court in that case.

In the present case the family as it stood at the time of the acquisitions consisted of Kali Kumar, his son Kailas and probably also his son Ram. Therefore this presumption of Hindu Law cannot apply to the present case. But there is another presumption also which is relevant and which is founded upon the principle that where the question is whether property standing in the name of a junior member of a Hindu joint family is his self-acquisition the criterion is to consider from what source the money comes with which the purchase money is paid. Therefore in the absence of evidence that the junior member had any separate funds or that the property in question was purchased with money belonging to him the presumption is clear and decisive that it was acquired by the head of the family in the name of the junior member and that it was not the self-acquired property of the junior member. This presumption applies to a family governed by the Dayabhag School of Hindu Law as also to such a family consisting of a father and his sons, as would appear from the decision of the Judicial Committee in the

(1) (1904) I. L. R. 31 Calc. 448.

(2) (1906) 4 C. L. J. 56.

case of *Parbati Dasi v. Raja Baikuntha Nath De* (1). The question therefore is whether in the present case it has been proved that the property in question was purchased with money belonging to Kailas and also whether it has been proved that Kailas had any separate funds of his own. So far as this question is concerned there is no evidence to show that the property was purchased with separate funds of Kailas, but our attention has been drawn by the learned vakil for the respondent to a passage in the judgment of the learned Subordinate Judge as containing a finding to the effect that at the time when the property was acquired Kailas had separate property of his own. Now the passage in the judgment to which reference is made runs in these words "It may at once be accepted from the evidence even on the defendants' side that Ram and Kailas were in possession of joint funds and that they were also in possession of separate funds." I am very doubtful whether this finding really relates to the point of time at which the acquisitions were made, that is to say the period from 1880 to 1886 when Kali Kumar was alive. The reasons for this doubt are these: The first part of this finding is to the effect that Ram and Kailas were in possession of joint funds. That evidently refers to a period after Kali Kumar's death, for so long as Kali Kumar was alive, it cannot possibly be said that Ram and Kailas were in possession of joint funds. I see no reason to hold that the other part of the finding that Ram and Kailas were in possession of separate funds relates to a different point of time from what is referred to in the first part of this finding. It will be seen on a reference to the judgment of the learned Munsiff that he found, and that finding has not been displaced by the learned Subordinate Judge, that on a certain calculation the properties were acquired when Kailas's age was between 8 to 15 years and according to another calculation, when he was between 17 and 23 years. This finding as I have said has not been touched or reversed by the learned Subordinate Judge. I am unable to hold that the finding of the learned Subordinate Judge to which our attention has been drawn is really a finding to the effect that at the time when the acquisitions were made Kailas had any separate funds of his own. In the absence of such a finding it is clear that the onus would be upon the defendants and not on the plaintiff.

It has been urged before us on behalf of the respondent that there is evidence on the record upon which it may be found that Kailas had separate funds of his own at the time of the acquisition,

(3) (1913) 19 C. L. J. 129.

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We think therefore that the proper order to make is to set aside the judgment of the learned Subordinate Judge and to send back the case to him so that he might come to a proper finding on the question as to whether Kailas had separate funds of his own at the time of the acquisitions, that is to say between 1880 and 1886. If he finds this question in the negative, then the onus will be on the defendants and the presumption to which I have referred will enure to the plaintiff's benefit and the plaintiff will succeed unless the defendants have succeeded in rebutting the presumption. If he finds this question in the affirmative, the presumption will not arise, and the onus will be on the plaintiff to prove that Kali Kumar Bose was the owner of the properties which were acquired in the name of Kailas and the plaintiff's suit will fail unless he succeeds in discharging that onus.

In the result the decrees of the learned Subordinate Judge are set aside and the cases sent back to him to be dealt with in accordance with the observations I have made. Costs will abide the result.

Greaves, J :—I agree.

A. T. M.

Appeals allowed : Cases sent back.

*Before Sir Hugh Walmsley, Knight, Judge, and Mr. Justice
 M. N. Mukerji.*

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 June, 18, 1925.
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KANAI LAL GHOSE AND OTHERS

v.

BASANTA BEHARI SEN AND ANOTHER.*

Charge, if extinguished—Durputni—Transfer by durputnidar—Putnidar accepting rent from transferee—Charge created for due payment of durputni rent—Rule against perpetuity—Present interest.

Under the terms of the Kabuliyat executed by durputnidars, a charge on certain immovable properties was created for all times to come for the due payment of the durputni rent and the performance of other obligations arising under the Kabuliyat. There was nothing in the Kabuliyat which indicated that the security would be extinguished on the lessee's liability to pay the rent ceasing with the

*Appeal from Appellate Decree No. 61 of 1923, against the decree of Babu Kumudini Kanta Roy, Subordinate Judge, 1st Court, of Hooghly, dated the 10th August, 1922, reversing that of Moulvi Sayidur Rahaman, Munsiff, 1st Court, at Chinsurah, dated the 26th May, 1921.

transfer. The durputnidar transferred his tenure and the putnidar accepted rent from the transferee after the transfer :

Held, that the durputnidar by merely transferring the durputni could not get rid of the charge created by him under the Kabuliyat and that the mere acceptance of rent by the putnidar from the transferee did not extinguish the same, though the relationship of landlord and his lessee the permanent tenure-holder ceased on the latter transferring the whole of his tenure : *Maharajadhiraj Sir Bejoy Chand v. Sarat* (1) distinguished.

That the security of this description which was to last for all times to come was not repugnant to the rule against perpetuities.

The rule against perpetuity affects only the creation of a future interest in property and the restricting of transfer of property by tying it up. It has no application to the case of a charge where a present interest is created and there is no transfer of an interest in property, but the property is merely made security for the payment of money.

Appeal by the Defendants.

Suit for declaration.

The material facts appear from the judgment.

Babu Nagendra Nath Ghose for the Appellants.

Babu Panchanan Ghose for the Respondents.

C. A. V.

The judgments of the Court were as follows :

Mukerji, J :—The facts necessary to be stated for the purposes of this appeal are these : In 1309, the plaintiff and his co-sharer obtained a durputni settlement of 4 annas share of 3 villages from the predecessors of defendant No. 1 and executed a Kabuliyat in their favour by hypothecating the said 4 as share of the 3 villages as well as 7 other mouzahs as security for the payment of the durputni rent and for the performance of obligations and discharge of liabilities incidental to the durputni. In 1312 they sold the said durputni to the defendant No. 2 ; and the defendant No. 1 recognized the transfer and accepted rent from the defendant No. 2. In the Kobala by which the durputni was sold there was a stipulation that the defendant No. 2 would furnish security to the defendant No. 1 or to the plaintiff and his co-sharer in order to replace the security given by the plaintiff and his co-sharer. On the defendant No. 2 failing to furnish the said security the plaintiff, to whom the 7 mouzahs in suit were subsequently allotted on partition between him and his co-sharer, instituted a suit against the defendant No. 2 making the defendant No. 1 pro-forma defendant for specific performance, and obtained a

(1) (1918) 29 C. L. J. 476.

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deposit of security in cash ; but the defendant No. 1 did not accept the said security. The plaintiff then instituted the present suit praying for a declaration that the said mouzas were no longer subject to any charge.

The Munsiff dismissed the suit, but the Subordinate Judge on appeal reversed that decision and granted the plaintiff a decree declaring that the charge no longer subsisted. From that decree the present appeal has been preferred by the heirs of the defendant No. 1.

The appellants' contention, which was the defence to the action, is that the liability of the lessee to the lessor continued notwithstanding the transfer, as based on the privity of contract between the parties ; that the lessor had also a remedy against the transferee for rent, and, on the covenants running with the land, the transferee was under a liability based on privity of estate ; that although the lessor has his remedy as against the transferee who is to be treated as primarily liable, the original lessee remains in the position of a surety and he cannot get rid of his liability merely by transfer. It is contended further that even if the liability to pay the rent be held to cease in consequence of the transfer the security remains in force and the charge is not extinguished.

The respondent urges that the lessee ceases to be liable for the rent as soon as the transfer is complete, and in any event if the lessor has accepted the transferee whether expressly or impliedly, e.g. by acceptance of rent ; that there having been acceptance of rent in the present case the original lessee's liability for rent has altogether ceased ; and that to hold under such circumstances that the security still remains in force would be to offend against the rule against perpetuities.

Now, there is no dispute that the durputni is a permanent tenure governed by the provisions of the Bengal Tenancy Act : *Mahomed Abbas Mondul v. Brojo Sundari Debia* (1). Under section 11 of the Bengal Tenancy Act it is capable of being transferred in the same manner and to the same extent as other immoveable property. Section 12 provides a limit as to the mode in which the transfer is to be made. As soon as the document by which the transfer is made is registered,—and the registration is not to take place until a condition precedent mentioned in section 12 is fulfilled—the transfer is complete. When the estate is transferred and the vendor ceases to have any estate, then if the vendor's liability is a liability consequent on privity of estate, that liability ceases : *Kristo Bulluo Ghose v.* (1) (1891) I. L. R. 18 Calc. 360.

Kristo Lal Singh (1); *Giris Chandra Guha v. Khagendra Nath Chatterjee* (2). The same principle has been held to apply in the case of transfer by the original lessee : *Hemendra Nath Mukerji v. Kumar Nath Roy* (3). It is clear therefore that after the transfer the plaintiff was no longer liable for the rent, and the defendant No. 1 was thenceforward to look to the defendant No. 2 for the same.

The next question is as to whether, when the liability for payment of the rent ceased the security continued and the charge remained in force. The appellants' contention is that it did, and that though as a consequence of the transfer the transferee became by operation of law the tenant of the tenure and the transferor ceased to be a tenant, the transferor was not necessarily absolved from the liability which was created by the contract. In support of this contention reliance has been placed upon a passage in the judgment of this Court in the case of *Rup Chand Ghose v. Narendra Krishna Ghose* (4). The passage indicates that the fact that by transfer the transferor ceases to be a tenant does not imply that he is absolved from liability under the terms of the contract between him and the lessor, and that it is conceivable that a person may cease to be a tenant and yet continue liable to the landlord under his personal covenant.

The respondent urges that if it is held that the security remains in force in spite of the transfer, it would mean that the lessor would be competent to impose a restriction on transfer of a permanent tenure which is transferable by law and that in that case the security might continue for ever and thus offend against the rule against perpetuities.

As regards the first of these objections, in my opinion, it is not well-founded on principle. In the case of *Dinobundhu Roy v. W. C. Bonerjee* (5) it was held by this Court that a transfer of a tenure made in terms of the provisions of the Bengal Tenancy Act is not binding on the landlord, if there is a contract between the landlord and the tenant that the transfer shall not be valid and binding until security to the satisfaction of the landlord has been furnished, and if such security has not been given; and that in such a case the original tenant is still liable for the rent. Permanent leases no doubt are transferable under section 11 of the Bengal Tenancy Act; but a provision in a lease of a permanent tenure for

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(1) (1889) 1 L. R. 16 Calc. 642.

(2) (1911) 16 C. W. N. 64.

(3) (1908) 12 C. W. N. 478.

(4) (1914) 19 C. W. N. 112 (114).

(5) (1892) 1 L. R. 19 Calc. 774.

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forfeiture or re-entry in case of assignment in violation of its terms would not be invalid. In *Kesav Lal Nag Mozumdar v. Harasit Ghose* (1) it was held by this Court that the provisions of section 10 of the Transfer of Property Act saving conditions restraining alienation in leases where the conditions are for the benefit of the lessor, are not inconsistent with the provisions of section 11 of the Bengal Tenancy Act, and that the two provisions of the two Acts are not inconsistent or repugnant to each other but are capable of standing together. It follows therefore that the lessor is competent to insist on a stipulation that he would not be bound by the transfer unless the transferee keeps the security in force. The whole question then resolves itself into one as to whether such an intention or its contrary may be gathered from the Kabuliyat. The learned Subordinate Judge has proceeded upon the decision in the case of *Maharaja-dhiraj Sir Bejoy Chand Bahadur v. Sarat Chandra Adhya* (2) which he treats as an authority for the proposition that the liability to pay the rent having ceased, the charge created for payment of rent is automatically extinguished. The decision in that case however rested upon the terms of the Kabuliyat on which the case was based and not upon any such general principle. The Kabuliyat in that case provided that so long as the lessees were not released from the liability to pay the rent, the lessees shall not be able to transfer in any manner the property mortgaged as security for the rent. It was held in the case that on the transfer being completed the lessees' liability to pay the rent ceased and therefore the security was at an end.

The relevant passages in the Kabuliyat in the present case are the following :—

".....We shall without objection provide the rent instalment by instalment. If we fail therein you will be entitled to recover the arrears, according to the law which is in force or which will be in force, from the said durputni Mehal and from the properties hypothecated as specified in Schedule (Kha) or from our other moveable and immoveable properties which stand in our names or benami. To that neither we nor our heirs or representatives shall have any objection at any time whatsoever.....if you suffer any damage by our acts.....then you will be entitled to recover the same from whatever immoveable or moveable properties we or our heirs or representatives shall have in our own name or benami and from the properties hypothecated and specified in Schedule (kha) and to that neither we nor they shall be entitled to raise any objection.....if

(1) (1910) 12 C. L. J. 126.

(2) (1918) 29 C. L. J. 476.

this durputni mehal be sold for arrears of rent due by us or in execution or is transferred in any other way, our representatives shall be bound by all the terms of this kabuliat.....Being in possession as Durputni Talukdar and maintaining intact the boundaries and regularly paying the rent, with our sons, grandsons, heirs and representatives shall in great felicity enjoy and possess the durputni interest with powers of gift and sale.....In case we do anything injurious to you we and our heirs and representatives shall be bound to compensate you therefor, and in order to secure the said damages and for the performance of all the stipulations of this kabuliyat we give as security the properties in Schedule (kha) below owned and possessed by us....."

These conditions created a charge on the 7 mouzahs for all times to come for the due payment of the durputni rent and the performance of the other obligations arising under the Kabuliyat, and there is nothing in the Kabuliyat which may go to indicate that the security would be extinguished on the lessees' liability to pay the rent ceasing with the transfer. That this was the intention of the parties is also suggested by the term in the Kobala by which the plaintiff and his co-sharer transferred the durputni to the defendant No. 2 by which the latter was required to furnish security to the plaintiff and his co-sharer or to the defendant No. 1 in order to replace the original security. This intention is also evidenced by the fact of the institution of the suit for specific performance the result of which however is not binding on the defendant No. 1.

As regards the contention that a security of this description which is to last for all times to come is repugnant to the rule against perpetuities, I am not prepared to regard the contention as well-founded. This rule affects only the creation of a future interest in property and the restricting of transfer of property by tying it up. The rule has no application to the case of a charge where a present interest is created and there is no transfer of an interest in property, but the property is merely made security for the payment of money. The creation of this charge was a part of the consideration for the durputni lease, and I am unable to see how it could be extinguished merely because the lessee chose to transfer his interest under the lease. The position therefore is this: The liability to pay the rent subsists so long as the relationship of landlord and tenant exists. This relationship as between a landlord and his lessee the permanent tenure-holder ceases on the latter transferring the whole of his tenure. The lease may create further rights and liabilities as

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between the parties thereto and where it does, they do not cease automatically on the termination of the relationship.

For these reasons I am of opinion that plaintiff by merely transferring the durputni to the defendant No. 2 could not get rid of the charge created by him under the Kabuliyat, and that the mere acceptance of rent by the defendant No. 1 from the defendant No. 2 has not extinguished the same. The plaintiff, in my opinion, is not entitled to the declaration sought for by him.

The decree of the learned Subordinate Judge should be set aside and that of the learned Munsiff restored and the plaintiff's suit dismissed with costs in all the Courts.

Walmsley J. :—I agree.

A. T. M.

Appeal allowed : Suit dismissed.

APPELLATE CRIMINAL.

*Before Sir Babington Bennett Newbould, Knight, Judge, and
 Mr. Justice B. B. Ghose.*

IBRAHIM AND OTHERS

v.

KING-EMPEROR.*

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February, 18, 19.

*Dacoity—Misdirection—Penal Code (Act XLV of 1860), See 391—
 Confession.*

The principal evidence against the appellants was that of an approver. This evidence was corroborated by evidence as to the accused being seen together at different times and places before and after the dacoity and also as to other circumstances. The learned Sessions Judge pointed out in his heads of charge there was no evidence besides that of the approver to show that the appellants actually took part in the dacoity :

Held, that so far as the evidence of the approver and the corroborative evidence given by witnesses were concerned, there was no misdirection.

A, who did not actually take part in the dacoity, was with others, before the dacoity and went with one of the dacoits to borrow a boat, but during the dacoity he was left in the larger boat at a place some 5 or 6 miles from the place of the dacoity and told to wait for other dacoits :

*Criminal Appeal No. 588 of 1924, against the order of G. C. Sankey Esq., Sessions Judge of Bakarganj, dated the 10th September, 1924.

Held, that A's action did not come within the definition of dacoity as given in section 391 I. P. C. as he was not present though he might have been aiding such commission or attempt.

A was examined by the committing Magistrate as a confessing prisoner. He stated that after the dacoity he was offered Rs. 100 which he took :

Held, that this statement was not a confession that he committed the dacoity and should not be taken into consideration as against the other accused.

• Appeal by the Accused (7 in number) under section 410 Criminal Procedure Code.

• The seven appellants were convicted of dacoity. The first three were sentenced to 7 years' rigorous imprisonment each, the fourth to 3 years' rigorous imprisonment, and the last three to 5 years' rigorous imprisonment each.

The material facts appear from the judgment.

Mr. Camell and *Babu Radhikaranjan Guha* for the Appellants.

Mr. Khundkar (*Deputy Legal Remembrancer*) for the Crown.

The judgment of the Court was as follows :

The seven appellants have been convicted of committing dacoity. The first three have been sentenced to 7 years' rigorous imprisonment each, the fourth to three years' rigorous imprisonment, the last three to 5 years' rigorous imprisonment each.

The case for the prosecution is that a dacoity was committed on a river in the night following the 8th of March. It was committed on a boat in which a sum of about 11000. Rupees was being taken from a place called Galachipa to Nalchiti and Jhalakati.

The principal evidence against the appellants is that of an approver. This evidence has been corroborated by evidence as to the accused being seen together at different times and places before and after the dacoity and also as to other circumstances. But as the learned Sessions Judge has correctly pointed out in his heads of charge there is no evidence besides that of the approver to show that the appellants actually took part in the dacoity. So far as the evidence of the approver and the corroborative evidence given by witnesses are concerned we hold that there has been no misdirection. But we must accept the contention urged on behalf of the majority of the appellants that there has been serious misdirection in the charge where he deals with the evidential value of the so called confession made by the accused Kalu and also of certain extra-judicial confessions

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made by the accused Sundar Ali as against the accused other than the makers of the confession.

It will be convenient to first deal with the appeal of the 4th appellant Kalu. The case for the prosecution is that this accused did not actually take part in the dacoity. He was with the others before the dacoity and went with one of the dacoits who is now absconding to borrow a boat, but during the dacoity he was left in a larger boat at a place some 5 or 6 miles from the place of the dacoity and told to wait for the other dacoits. In the case of this accused the jury gave a special verdict in these terms:—
When asked with regard to Kalu the reply of the jury was,—
"Guilty. He is their servant and at first he did not know a dacoity would be committed. He was not present when the dacoity was committed. His case may be considered."

Though the jury apparently held that Kalu was to some extent aiding the commission of the dacoity having regard to the definition of dacoity in section 391 Indian Penal Code we must hold that on this finding he should not have been convicted. He was not one of those who were conjointly committing or attempting to commit robbery, and though he may have been aiding such commission or attempt he was not present and therefore his action did not come within this definition. This Kalu was examined by the Magistrate as a confessing prisoner and it is contended that this statement made by him was not a confession so that it can be taken into consideration as against the other accused under the provisions of section 30.

We think there is considerable force in this contention. Kalu in this statement describes the movements of himself and other accused tried for the dacoity. The only really incriminating statement that he makes is that after the dacoity he was offered 100 Rupees which he took. This statement is certainly not a confession that he committed the dacoity, and we think that it should not have been put to the jury as a matter to be taken into consideration as against the other accused. But it is not necessary to consider to what extent an incriminating statement is to be regarded as confession within the meaning of section 30 of the Evidence Act for whether we hold that this statement was not a confession or whether we hold that it was a retracted confession, it has no evidential value as against Kalu's co-accused. The learned Sessions Judge treated it as a retracted confession, and although in one part of his charge he correctly told the jury that the retracted confession of a co-accused is practically of no value

against anybody but himself, he prevented this direction being properly appreciated by the jury by referring to this confession of Kalu and also to the extra judicial confession of the appellant Sunder Ali as being evidence to be taken into consideration in considering the case of each of the other accused. When the jury were referred to the mentioning of individual accused in the confession of Kalu and the extra-judicial confession of Sunder Ali they were not likely to properly appreciate the direction that they were to regard these statements as of no value as against the other accused. We must hold that this was likely to prejudice the jury and lead them to give some weight to these statement when they should have disregarded them altogether, and we hold that this caused a miscarriage of justice and necessitates a retrial of all those accused in respect of whom there has been such misdirection. This applies to all the appellants except Kalu and Sunder Ali.

Sunder Ali was not named in Kalu's statement or confession. So as regards him there has been no misdirection on this point. It is urged that there has been misdirection on other points. It is said that the evidence of witnesses who corroborate the approver as to association before and after the dacoity is no real corroboration, because the approver was examined by the police after the police had obtained this information as to these movements from these witnesses. It certainly cannot be said that as a point of law the evidence of witnesses who support the statement of the approver is not corroborative evidence because this evidence was known to the police before the approver was examined by them. It may be argued and probably was argued at the trial that the approver's evidence should not be believed because he might have been tutored by the police to make a statement which fitted in with the evidence of witnesses who had been previously examined. But at the most it was a matter of non-direction on the part of the Judge not to draw the attention of the jury to this point. We do not consider it a serious matter of non-direction since the attention of the jury was fully drawn to the necessity of considering how far the evidence of the approver can be believed.

Another point in which misdirection is alleged is that the attention of the jury was not drawn to the statement in the first information that the informant Benode Behary Pal's Gomosta in charge of the money suspected his own boatmen. We think that

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having regard to the reasons there given for the suspicion nothing can be based on it to support the case for the defence.

It rather renders the story as to the fact of the dacoity more probable.

It is urged that the evidence as to the extra-judicial confession made by Sunder Ali was not properly put to the jury. The learned Sessions Judge when referring to this confession spoke of it as the alleged confession of Sunder Ali and in placing the evidence before them he pointed out to the jury that it was for them to decide whether this confession had been made. We cannot say there was misdirection because attention was not drawn to the statement of the witness Najam ali Talukdar that he did not inform the police or the Panchayet of the confession. The objection to the statement of Darbarulla that he understood that Kabiruddin Gomostha, Sunder Ali and Jahan Mirdha had committed dacoity would be open to serious objection as regards Kabiruddin and Jahan Mirdha since it is not clear from the deposition that this understanding in respect of them was based on the statement made by Sunder Ali. But in the case of these two appellants we have already held that there must be a retrial. His statement as to Sunder Ali's confession is somewhat vague, but the attention of the jury appears to have been sufficiently drawn to this point. So far as Sunder Ali is concerned we can see no ground for holding that there was mis-direction or any other ground for setting aside the verdict of the jury.

We accordingly allow the appeal of the appellant Kalu. We set aside his conviction and sentence and direct that he be released.

The appeal of the appellant Sunder Ali is dismissed. We allow the appeals of the appellants Ibrahim, Jahan Mirdha, Shara-juddi, Kadamali and Khabiruddin Gomostha. We set aside their convictions and sentences and direct that they be retried according to law.

A. T. M.

Appeals allowed : Retrial ordered Appeal of Sunder Ali dismissed.

*Before Sir Babington Bennett Newbould, Knight Judge, and
Mr. Justice B. B. Ghose.*

LEDU MOLLA and OTHERS

v.

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CRIMINAL.

1925.

January, 14, 15.

Gang—Penal Code (Act XLV of 1860), Sec. 400—Evidence as to previous commission of offence or previous conviction, if admissible—Approver—Corroboration—Statement of a confessing accused.

. In a trial for an offence punishable under section 400 Indian Penal Code, the evidence of previous commission of an offence or that the accused were bound down under section 110 of the Code of Criminal Procedure is admissible for the purpose of proving that offence : *Bhona v. Emperor* (1) and other cases.

It is not necessary that an approver should be corroborated as regards every simple statement that he makes.

The statement of a confessing accused may in some cases be verified by enquiry on the spot.

Appeals by the accused (18 in number) under section 410 Criminal Procedure Code.

Ledu Molla was convicted on his pleading guilty under section 400 Indian Penal Code and was sentenced to transportation for life. Anjariali and 4 others were sentenced to 10 years' transportation. Hasan and another were sentenced to 5 years' rigorous imprisonment each.

The material facts appear from the judgment.

Babus Sures Chandra Talukder and Mohendra Kumar Ghose for the Appellants.

Mr. Khundkar (Deputy Legal Remembrancer), and Babu Lalit Mohan Sanyal for the Crown.

The judgment of the Court was as follows :

The 18 appellants before us in these two appeals have been convicted of an offence punishable under section 400 Indian Penal Code, namely, of belonging to a gang of dacoits. One of the appellants Ledu Molla was convicted on his plea of guilty. The other 17 have been convicted on a unanimous verdict of guilty by the jury. In this case 171 witnesses were examined for the prosecution, 35 witnesses were examined for the defence and one witness was examined by the Court. There were also 69 documents exhibited on behalf of the prosecution. As there is no appeal on the facts it is unnecessary for us to discuss this evidence. The learned Sessions

January, 15.

* Criminal Appeals Nos. 478 and 485 of 1924, against the order of G. C. Sankey Esq., Sessions Judge of Bakerganj, dated the 25th June, 1924.

(1) (1911) I. L. R. 38 Calc. 408.

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Judge has dealt with it carefully and at sufficient length in his charge to the jury.

On behalf of the appellants the points taken are that there has been misdirection and also wrongful admission of evidence on certain points. The first point raised is that in a trial for an offence punishable under section 400 Indian Penal Code the evidence of commission of an offence or that the accused were bound down under section 110 Criminal Procedure Code is not admissible. Some support to this contention is to be found in the case of *Kasem Ali v. Emperor* (1) following an earlier decision of this Court in *Mankura Pasi v. Queen Empress* (2). But these cases were decided on the point that evidence of previous conviction could not be used for the purpose of proving character. In the latter of these cases a doubt was expressed whether they might not be used for proving association, and further the attention of the learned Judges who decided the last of these two cases was not drawn to other cases of this Court in which it was distinctly held that such evidence was admissible. The cases in which a contrary view was taken are *Bhona v. Emperor* (3) and *Kader Sundar v. Emperor* (4) and in both these cases it was held that such convictions can be proved for the purpose of proving habit as well as association. In the case *Bhona v. Emperor* (3) several unreported cases are cited in support of the view that was taken, and in the present case our attention has been drawn to a more recent unreported case *Emperor v. Arajulla Pramanik and others* decided by Walmsley and Pearson J. J. on the 17th November 1921. We are in entire agreement with the authorities which hold that such evidence is admissible for this purpose and overrule this objection.

The next point taken is that the jury were not properly charged as regards certain circumstances under which the approver who gave evidence in this case first confessed. It is not alleged that the facts proved as to these circumstances have not been correctly stated to the jury. What is urged is that the learned Judge should have told the jury that these circumstances made the approver's evidence unworthy of credit. It would appear however that the learned Judge himself was of opinion that the approver was a witness of truth and he could not therefore have told the jury that in

(1) (1919) I. L. R. 47 Calc. 154; 31 C. L. J. 192.

(2) (1899) I. L. R. 27 Calc. 139.

(3) (1901) I. L. R. 38 Calc. 408.

(4) (1911) 16 C. W. N. 69.

his opinion the approver should be disbelieved on account of these circumstances. In this connection it is said that the jury were misdirected as to the failure of the prosecution to call as witness the C. I. D. Inspector Akhoy Kumar Gupta who had interviews with the approver on two occasions. We agree with the learned Sessions Judge that it is very doubtful as to the point on which this witness could give evidence of any value and that the statement made by the approver to this witness could not have been proved by the prosecution. The learned Judge told the jury that they might draw an inference adverse to the prosecution if they held that this Inspector was an important witness and had been deliberately withheld, and that under the circumstances was quite sufficient.

As regards the general direction as to the evidence of the approver the learned Sessions Judge gave the ordinary direction in a manner to which no objection can be taken. It is said that he was wrong in telling them that if the approver was corroborated on some points they might believe him on other points in respect of which he was not corroborated. The jury were told however that the condition of believing him on those uncorroborated points was if they thought it reasonable. It is not necessary that the approver should be corroborated as regards every simple statement that he makes, and as we read the charge in this respect we hold that the jury were rightly directed.

Objection has been taken to the evidence as to the verification of his confession by the approver. It is said firstly that the learned Sessions Judge attached too much weight to this evidence and was too dogmatic in telling the jury his own opinion as to its value. The passage to which objection has been taken is in the following terms: "I would suggest to you that it would not be possible for Asmatali to be tutored to this extent by the Inspector in the course of two interviews in the Jail; but it appears to me that the results of the verification of the confession of Asmatali prove without doubt that Asmatali Sheikh did himself take part in the dacoities which he describes." That passage by itself might be objectionable. But reading the charge as a whole we find over and over again that the Judge impressed on the jury that they were to form their own opinion on questions of facts, and in this particular passage he told the jury that the matter was one for them to decide.

It is further urged that the procedure adopted in verifying the confession had been condemned in this Court. Our attention has been drawn to certain decisions, but those decisions do not lay

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down as a general rule that in no case can the statement of a confessing accused be verified by enquiry on the spot. They are rather condemnatory of the procedure which was in fact followed in those individual cases. They cannot be held to support the contention that the identification proceedings in the present case were of no value as corroboration of the accomplice evidence.

Some other points were urged, but on our expressing the opinion that they are untenable they were not pressed by the learned vakil for the appellants.

The sentences passed on several of the accused are severe, but the learned Sessions Judge has given good reasons for the severity of these sentences.

The appeals are dismissed.

A. T. M.

Appeals dismissed.

Before Mr. Justice Cuming, and Mr. Justice Mukerji.

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August, 24, 25, 26.

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Abduction—Summing up, object of—Criminal Procedure Code (Act V of 1898), Sec. 297—Cross-examination of one's witness, effect of—Evidence Act (I of 1872), Secs. 6, 8, 45, 47, 73, 154, 157—Earliest statement of witness, filling up gap,—Statement before Sub-Inspector—Earliest version of occurrence—Res gestae—Diary—Charge—Law, how explained—Penal Code (Act XLV of 1860), Sec. 120B, charge under—Handwriting—Non-direction—Jury to consider individual cases.

The object of a summing up under section 297 of the Code of Criminal Procedure is to enable the Judge to place before the jury the facts and circumstances of the case both for and against the prosecution so as to help them in arriving at a right decision upon the points which arise for their consideration.

The result of cross-examining one's own witness under section 154 of the Evidence Act is to discredit that witness altogether and not merely to get rid of a part of his testimony: *Faulkner v. Britne* (1).

In the course of his evidence in the present trial, the witness made a state-

*Criminal Appeal No. 259 of 1925, against the order of the Sessions Judge of Rungpur.

(1) (1858) 1 F. & F. 254.

ment to the effect that at a time when A asserted that he had lawfully married B, the latter remained silent. This the witness said in his examination-in-chief. The accused declined to cross-examine him. Thereupon certain questions were put to this witness by the foremen of the jury. Thereafter the prosecution again examined this witness in chief and in the course of this further examination questions were put to the witness by the prosecution in order to bring out the fact that in his depositions as given in the previous trial as also before the committing Magistrate in the commitment enquiry which preceded that trial he had made statements which would go to show that B was trembling. The Sessions Judge allowed these questions, which were questions in the nature of cross-examination, to be put to the witness. After these questions had been answered the prosecution was permitted to put in the depositions of this witness and they were marked as exhibits in the case :

Held, that the accused were prejudiced.

The net result of allowing these questions to be put by the prosecution was to deprive the accused of the benefit which might accrue to them from any statement which the witness might have made in favour of the accused and which the defence could have availed of if the witness had been allowed to be cross-examined by the prosecution.

The party desiring to cross-examine its own witness has to take the permission of the Court, implying thereby that there is a discretion in the Court whether it would permit the witness to be cross-examined or not. That discretion has always to be exercised with caution by the Court before which the matter comes up for consideration.

Held, that the result of the procedure adopted was to deprive the accused of the benefit of any statement which the witness might have made in their favour.

That if the object of the prosecution was to show that the witness had merely omitted to mention the fact in the present trial but had spoken about it consistently before and should therefore be relied upon, they wanted to get rid of a part of the testimony of the witness and were relying upon the earlier statements as a piece of substantive evidence in the case which they could not be permitted to do. The earlier statements could not be let in under section 157 of the Evidence Act as there was nothing in the deposition of the witness in the present trial which might be corroborated by these earlier statements.

That there was no justification for the whole of the depositions being brought as evidence in the present record.

If any suggestion was made in the course of cross-examination to the effect that a witness had made a particular statement in the previous trial which as a matter of fact the witness did not make in that trial, the proper course for the Judge is to disallow the question. The whole of the deposition cannot be used for any purpose in connection with a matter like this and only particular passages which are relevant may be used by the jury.

The Judge should either at the time when a statement made by a witness recorded by the Sub-Divisional Magistrate in the course of the enquiry held by him, is admitted, or when charging the jury, tell them definitely the purpose for which the statement was admitted.

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The earliest version of the occurrence as given by the informant or prosecutor, who is the principal witness to the occurrence and on whose testimony practically the whole case depends, has always to be placed before the jury in order to judge of the truth or falsity of the prosecution case.

What a witness says at the time of occurrence in respect of the occurrence itself is *res gestae* under section 6 of the Evidence Act. But his statement as to an event which took place a year ago will not be part of *res gestae*.

The fact that the prosecution challenged the authenticity of the personal diary of the Sub-Inspector as containing an interpolation and that they pointed out other circumstances which might indicate that it should not be relied upon does not justify the judge in withholding it entirely from the jury. A verdict obtained from the jury without placing before them the piece of evidence in favour of the defence, whatever may have been its real worth, cannot be sustained.

• It is not in every case the Judge is bound to state in his charge how he explained the law to jury. But the charge must be recorded in such a way as would enable the High Court sitting as a Court of appeal to judge whether the facts and circumstances of the case had been properly placed before jury and also whether the law has been correctly explained.

Where there is a charge under section 120 B of the Indian Penal Code and there is a question as to the *bona fides* or otherwise on the part of the accused as also various other questions of fact, it is absolutely necessary to record the charge in such a way as will enable the High Court to ascertain whether the law has been properly explained to the jury or not in relation to the facts of the case and also whether the facts in so far as they bear upon the elements necessary to constitute the offences were properly explained to the jury or not.

Certain letters were produced on behalf of the accused and it was allowed on behalf of the defence that these letters were written by B. The letters were not proved as having been written or signed by B:

Held, that the accused in order to use these letters as evidence in their favour had to prove that the letters had been written by B. For this purpose they could rely upon expert evidence under section 45 of the Evidence Act or the opinion of a competent witness under section 47 of the Act or direct comparison of the letters with proved or admitted documents under section 73 of the Act. This comparison had to be made by the Court or by a witness called for the purpose. If the defence had succeeded in proving by other evidence that the letters had actually been written by B there was no point in making the comparison. It is only where such evidence is not available and where although the handwriting in the letters had not been proved by independent evidence to have been the handwriting of B that it is necessary to have recourse to the provisions of section 73 of the Evidence Act to see whether by comparison it can be determined whether the letters were written by B or not. The issue before the Court in a case like this is whether B had written the letters. The result of their comparison is the determination of an issue arising in the case and is quite distinct from the determination of the question of admissibility or otherwise of evidence, which latter is within the province of the Judge alone.

Held, that the Judge in not placing before the jury and in not asking them to compare with the writing in the letters the handwriting taken in Court omitted

to give the accused persons an opportunity of getting an opinion of the jury on the question as to whether the letters were really written by B or not.

Although there were three accused persons and the case as against all the three did not stand on the same footing, the Judge did not ask the jury to consider the case as against each of the accused individually :

Held, that this was a very serious omission and was likely to have prejudiced the accused persons having regard to their defences which were not similar but different.

Appeal by the Accused.

The material facts appear from the judgment.

Mr. S. K. Sen (Counsel), Mr. Wahed Hossain, Babus Pramatha Lall Dutt, Jnan Chandra Roy and Benoyendra Prosad Bagchi for the Appellants.

Mr. A. K. Basu (Counsel) for the Crown.

Babu Lalit Mohan Sanyal for the Complainant.

C. A. V.

The judgments of the Court were as follows :

Mukerji, J. : The three appellants that is to say No. 1 Khijiruddin Sonar, No. 2 Nawabali Sheikh and No. 3. Qamruzzaman (alias Quamarulzaman) were tried by the Sessions Judge of Rungpur with the aid of a jury. The jury were divided in the proportion of four to one. The majority convicted the appellants in respect of the charges on which they were tried viz Nos. 1 and 2 under sections 364, 344 and 120B and No. 3 under sections 364, 342 and 120B. The learned Judge accepting the verdict convicted the appellants of the said offences and sentenced the appellant No. 1 to rigorous imprisonment for 10 years under section 366 Indian Penal Code and to the rigorous imprisonment for three years under section 344 Indian Penal Code, the sentences to run consecutively ; the appellant No. 2 to rigorous imprisonment for three years under section 366 Indian Penal Code and to rigorous imprisonment for one year under section 344 Indian Penal Code the sentences to run concurrently ; and the appellant No. 3 to rigorous imprisonment for 5 years under section 366 Indian Penal Code and to rigorous imprisonment for one year under section 342 Indian Penal Code the sentences to run concurrently. No separate sentence was passed for the offence under section 120B Indian Penal Code.

It is not necessary to set out in detail the case for the prosecution upon which the trial was held, for it is to be found narrated in sufficient detail in the learned Judge's charge to the jury. Short-

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ly stated, the prosecution case was that a girl Subāsini was abducted by the first two appellants some time in February 1923 from Gaibandha where she used to reside with her parents, that thereafter she managed to escape from the custody of the appellant No. 1 some time in March 1923 when she was again abducted by the appellant No. 1 from a railway station called Trimohini. After the second abduction, the case for the prosecution is, the girl remained with the appellant No. 1 for about a year, roughly speaking from March 1923 till March 1924. The prosecution case further is that after she had succeeded in escaping from the custody of the appellant No. 1 in March 1924 she was again abducted at Gaibandha by the three appellants acting in conspiracy with each other. She was thereafter detained, according to the case for the prosecution, in the house of the appellant No. 3 for about a day wherefrom she was removed to the house of the appellant No. 1 where she was detained for a period over ten days. According to the prosecution case she was recovered from the house of appellant No. 1 on execution of a warrant issued by the Sub-Divisional Officer of Gaibandha who had in the meantime received an anonymous letter informing him about the abduction. She is said to have been recovered as aforesaid on the 6th of April, 1924.

The defences of the three appellants are not exactly the same. But it is unnecessary to set out the defences here, because the learned Judge in his charge to the jury has given a substantially correct synopsis of the different defences of the three appellants.

Various points have been argued before us on behalf of the appellants by Mr. Sen who has appeared on behalf of the appellant No. 3 and by Mr. Wahed Hossain who has appeared on behalf of the first two appellants. Mr. Basu has appeared on behalf of the Crown. It will not be possible within the short space of this judgment to deal with all the points that have been urged in this appeal. These points vary in the degree of their strength, some being points of very great importance and substance, others apparently appear to be well founded but have been successfully met by Mr. Basu and others again rest upon very slender basis or upon materials which when examined do not afford any real support. It would only be possible to refer to some of the salient features of the case and a few only of the grounds which to us appear to be of importance.

Before dealing with the points I desire to make a few observations as to the general character of the learned Judge's charge to

the jury. Section 297 Criminal Procedure Code enjoins that when the case for the defence and the prosecutor's reply, if any, are concluded the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence and laying down the law by which the jury are to be guided. The object of a summing up under that section is to enable the Judge to place before the jury the facts and circumstances of the case both for and against the prosecution so as to help them in arriving.....at a right decision upon the points which arise for their consideration. If that be the object with which section 297 of the Criminal Procedure Code was enacted I must say that in this particular case that object has not been fulfilled but rather frustrated by the way in which the learned Judge charged the jury. The heads of charge recorded by the learned Judge read more like a judgment or a speech of a prosecuting counsel than a summing up of the case as required under the law. Even as a judgment it lacks in sobriety and there is in it a want of judicial equanimity which is the very essence of a judgment in a trial. As a speech of a prosecuting counsel it is open to the comment that it uses language which in some instances may be said to overstep the legitimate bounds of advocacy.

I refer to a few instances only. In dealing with the witnesses who are said to have deposed in connection with the occurrence that took place at the Trimohini Railway Station the learned Judge told the jury that those witnesses had acted selfishly and were morally and legally and on their own showing guilty of abetting a villanous crime and that in his experience he had never come across a more contemptible pair of cowards or one more selfishly deaf to the common claims of humanity. This is not my language but the language of the learned Judge. The learned Judge characterised Banamali and Biseswar while narrating what they did at the Gaibandha Railway Station as a precious pair of poltroons, the evidence of the Sub-Assistant Surgeon of Gaibandha as shilly-shallying evidence, and as the evidence of a witness who showed a more than usual tendency to hedge and play for safety in giving his opinion. When putting the evidence of the Sub-Assistant Surgeon in contrast with that of the Sub-Divisional Magistrate he exhorted them with an amount of vigour which is apparent on the face of the charge: he told them that it would not be difficult for them to decide which of the two opinions was the more entitled to respect. This is not all. The learned Judge presented too forcibly before the jury those aspects of the defence case which would appeal

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to them as most revolting. The defence which the appellants had seriously put forward before the Court was unquestionably worthy of consideration whatever might have been its worth. The learned Judge told the jury that if they were to give effect to the defence put forward by Khijiruddin they would have to hold that the girl had done an act which was doubly bigamous and adulterous and which was in defiance of law, custom, religion and morality. A part of the defence of the appellant No. 1 was characterized as having been rather mistily adumbrated. When referring to the fact that there was no evidence in support of the defence which the appellant No. 1 had taken to the effect that he had been married to the girl the learned Judge instead of telling the jury that it is no part of the duty of the accused person to adduce any evidence in his defence if he does not wish to do so and that the jury were not entitled to draw any inference from this omission on the part of the accused, went on asking them to take into their serious consideration the fact that the defence had not suggested any answer to some of the prosecution arguments and that they had not given any evidence. He called the policemen who are said to have been with the appellant No. 3 his henchmen and throughout the charge referred to the acts alleged to have been done by the appellants as partaking of the character of criminal acts. He asked the jury to consider whether the version given by the defence was one that a person of ordinary prudence and sanity could reasonably accept as true. It is unnecessary to refer to other passages of the learned Judge's charge to the jury; but, as I have already said, if the object of summing up is to assist the jury in arriving at their decision this charge instead of helping them in forming their own decision impressed the Judge's conclusions indelibly on their minds and gave them no option but to arrive at a decision which the Judge himself had arrived at namely, that the accused were guilty and that there was no substance in the defence put forward by them. The learned Judge found the facts for the jury and made a laboured attempt in order to persuade them to accept his conclusions as correct.

Turning now to the points which have been specifically taken on behalf of the appellants there are some which deserve special mention.

The first objection taken to the trial held is to the effect that evidence had been admitted which was not admissible in law. This objection relates to three different matters. The first item

to which this objection relates is with regard to exhibits 13 and 13A. Exhibit 13 is the evidence of prosecution witness No. 11 Jogesh Chandra De as given before the Assistant Sessions Judge in a previous trial of appellants Nos. 1 and 2 the subject matter of which trial was the two earlier occurrences of abduction, namely, the one which took place at Gaibandha and the other which took place at the Trimohini Railway Station. Exhibit 13A is the deposition of the same witness before the Committing Magistrate in the course of the commitment enquiry preliminary to the said trial. The circumstances under which these two depositions came to be admitted in the present trial are these: In the course of his evidence in the present trial, the witness made a statement to the effect that at a time when Khijiruddin asserted that he had lawfully married Suhasini, the latter remained silent. This the witness said in his examination-in-chief. The accused declined to cross-examine him. Thereupon certain questions were put to this witness by the foreman of the jury. Thereafter the prosecution again examined this witness in chief and in the course of this further examination questions were put to the witness by the prosecution in order to bring out the fact that in his depositions as given before the Assistant Sessions Judge in the previous trial as also before the Committing Magistrate in the commitment enquiry which preceded that trial he had made statements which would go to show that the girl was trembling, obviously meaning that even if she had a desire to protest it was not possible for her to do so in the circumstances in which she was at the time. The learned Judge allowed these questions, which were questions in the nature of cross-examination, to be put to the witness. After these questions had been answered the prosecution was permitted to put in the depositions of this witness to which I have referred and they were marked as exhibits 13 and 13A in the case. The learned counsel appearing on behalf of the Crown urges that the reception of this evidence, even if it be held that it was inadmissible, did not prejudice the accused persons. With this argument I am unable to agree. The accused undoubtedly must have been prejudiced and for two reasons. When a witness who has been called by the prosecution is permitted to be cross-examined on behalf of the prosecution under the provisions of section 154 of the Evidence Act, the result of that course being permitted is to discredit that witness altogether and not merely to get rid of a part of his testimony. [Lord Campbell C. J. in *Faulkner v. Brine* (1)]. This has been held in a good number of cases (1) (1858) 1 F. and F. 254.

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in this country as well, amongst which reference may be made to two, namely, the case of *Luchiram Motilal v. Radha Charan Poddar* (1) and the case of *Emperor v. Satyendra Kumar Dutt Chowdhury* (2). The net result of allowing these questions to be put by the prosecution was to deprive the accused of the benefit which might accrue to them from any statement which the witness might have made in favour of the accused and which the defence could have availed of if the witness had not been allowed to be cross-examined by the prosecution. For this reason the law has enacted that the party desiring to cross-examine its own witness has to take the permission of the Court, implying thereby that there is a discretion in the Court whether it would permit the witness to be cross-examined or not. That discretion has always to be exercised with caution by the Court before which the matter comes up for consideration. In this instance it does not appear that any permission was sought for or was given. The result of the procedure adopted was to deprive the accused of the benefit of any statement which the witness may have made in their favour. That is one of the reasons why this procedure should not have been allowed. If however this was not the intention of the prosecution but their only object was to show that the witness had merely omitted to mention the fact in the present trial but had spoken about it consistently before and should therefore be relied upon, then it amounts to this that they wanted to get rid of a part of the testimony of the witness and were relying upon the earlier statements as a piece of substantive evidence in the case which however they cannot be permitted to do. The earlier statements cannot be let in under section 157 of the Evidence Act as there is nothing in the deposition of the witness in the present trial which may be corroborated by these earlier statements. Moreover there is hardly any justification for the whole of the depositions being brought as evidence in the present record, and the jury were not directed as to how they were to deal with this evidence. It is true, as the learned counsel for the Crown has urged that there is enough other evidence which if believed would indicate that there was no marriage between the appellant No. 1 and the girl. But that is a matter as to the weight of evidence which does not concern us, nor did it concern the learned Judge. It was a matter entirely for the jury.

The next item to which this objection relates is Exhibit 14 which is the deposition of Suhasini given by her in the trial before the Assistant Sessions Judge. The learned counsel appearing on behalf of the Crown urges that in view of the cross-examination of

(1) (1921) 34 C. L. J. 107. •

(2) (1922) 37 C. L. J. 473. •

Subasini it was necessary for the prosecution to put this evidence in. While I can see that it was necessary for the prosecution to put in particular passages from out of this deposition in order to rebut the suggestions which were being made on behalf of the defence that certain statements which were made in the present trial had not been made by the witness in the previous trial, I do not see why it would be necessary to put the whole of the deposition of the witness as given in the previous trial for the purpose of corroborating the witness in the evidence which she has given in the present trial. If it be that any suggestion was made in the course of the cross-examination to the effect that the witness had made a particular statement in the previous trial which as a matter of fact the witness did not make in that trial and that suggestion was not correct, the proper course for the learned Judge was to have disallowed the question. The whole of the deposition is sometimes admitted for the sake of convenience. But the whole of the deposition cannot be used for any purpose in connection with a matter like this and only particular passages which are relevant may be used by the jury. It does not however appear whether the whole of the deposition as contained in Exhibit 14 was read out to the jury or not and I am therefore not in a position to say how far the reception of this deposition as evidence has prejudiced the accused persons.

The third objection under this head relates to the statement recorded by the Sub-Divisional Magistrate in the course of the enquiry which he held on receipt of the anonymous letter. The point urged on behalf of the defence in this connection is that exhibits 5 and 6 the statements made by Krishna Das Banik and Jogesh Chandra De recorded by the Sub-Divisional Magistrate were inadmissible in evidence in the present trial. The learned counsel for the Crown has urged that these statements were recorded by an authority competent to investigate into the facts and they could be admitted under the provisions of section 157 of the Indian Evidence Act. I do not see any particular objection to these statements, although I must say that the learned Judge should have either at the time when these statements were admitted or when charging the jury told them definitely the purpose for which these statements were admitted in the case.

The second ground urged on behalf of the appellants is to the effect that the statement of Subasini made by her on the 7th of April 1924, before the Sub-Divisional Magistrate and which has been marked in the present trial as exhibit 4 in the case was not

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brought to the notice of the jury by the learned Judge in the course of this summing up. This, in my opinion, is a serious omission. In that statement is to be found the earliest version of the occurrence as given by Suhasini, and it was obligatory on the part of the learned Judge to draw the attention of the jury to that statement so that they might judge whether the case as against the appellant No. 3 particularly and probably the case against the other appellants as well had not been developed gradually and whether facts and circumstances were subsequently alleged against them which had not been stated by the witness in her first statement before the Sub-Divisional Magistrate. The learned counsel for the Crown has urged that even before the girl made her statement before the Sub-Divisional Magistrate there were other materials existing from before in which it was mentioned that all the accused persons were concerned in the offence, e.g. the anonymous letter exhibit 1 which the Magistrate had received on the 30th March 1924. He has also drawn our attention to the other pieces of evidence, for instance the evidence of the Sub-Divisional Officer, and the evidence of Bisseswar prosecution witness No. 7 and of the girl herself which, if believed, would go to show that the present story of the girl was the story given to the authorities before there was any chance of the girl being tutored. That may be so, but then it was a matter entirely for the jury to consider and the accused had a right that this piece of evidence exhibit 4 which was in their favour was properly placed before the jury in order that they might have given it a proper consideration. The earliest version of the occurrence as given by an informant or prosecutrix who is the principal witness to the occurrence, and on whose testimony practically the whole case depends, has always to be placed before the jury in order to judge of the truth or falsity of the prosecution case.

The third objection relates to a still more serious matter. The father of the girl Bonomali was examined as a witness in the case. His son-in-law P. W. 7 Bisweswar in the course of his examination-in-chief was allowed to state that he and his father-in-law Bonomali was in the station platform when the voice of the accused Nos. 1 and 2 or rather of some persons was heard. Bonomali got up hurriedly and said "Bisweswar, destruction has come about. Those ruffians who a year ago took away Suhasini have again come. Let us be off, caste and honour are at stake." Although Bonomali was not examined as a witness, through the mouth of P. W. 7 this statement was brought on the record. The learned counsel for the Crown says that this evidence is relevant

under the provisions of sections 6 and 8 of the Evidence Act—under section 6 of the Evidence Act as part of the *res gestae* and under section 8 of the Evidence Act as explaining the conduct of Bisweswar in his leaving the place and running away with Bonomali. I am of opinion that the statement is wholly inadmissible and that neither section 6 nor section 8 of the Evidence Act would justify the reception of this evidence. What Bonomali told at the time of the occurrence in respect of the occurrence itself is *res gestae* under section 6 of the Evidence Act. But his statement which was with regard to an event which took place a year ago and which was meant to convey that the accused persons who were there had taken away Suhasini by force a year ago would not be part of *res gestae* but related to an altogether different transaction separated by a sufficiently long interval of time and by no stretch of imagination would the area of events which may be taken as covering the *res gestae* of the present occurrence extend to what happened in the earlier occurrence. Section 6 of the Evidence Act therefore would not help the prosecution. As regards section 8 of the Evidence Act I am exceedingly doubtful whether the conduct of Bisweswar was a relevant fact in the present trial, but assuming that it was, any statement made by Bonomali which would affect the conduct of Bisweswar when Bonomali was not examined would be purely hearsay evidence and would not come under section 8 of the Evidence Act. I am clearly of opinion that the reception of this evidence prejudiced the accused very seriously, for although Bonomali was not a witness, we have on the record a statement of Bonomali which contradicts and gives a direct denial to the main defence of the appellants which is to the effect that the girl had been made over by Bonomali to the appellant No. 1 and had been married to him. Even if there was nothing else in the case and if this was the only objection taken on behalf of the appellants I should have been prepared to upset their convictions.

The fourth objection relates also to a matter of similar importance. It is to the effect that the personal diary of the Sub-Inspector the appellant No. 3 which was proved by the prosecution and marked as exhibit 10 in the case was not put before the jury at all by the learned Judge. This diary, it is said by the prosecution, contains an interpolation and therefore is a piece of evidence which if put before the jury, might have gone against the defence. Assuming for a moment that there is an interpolation in that diary and that an inference adverse to the appellant

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No. 3 may be drawn from that interpolation, still according to the case for the defence the diary contains statement recorded by the Sub-Inspector of his own movement and conduct in connection with this case recorded at a time when there was not the slightest indication that any case would be started against him with regard to the occurrence. The Sub-Inspector might well say that this diary contains a true account of what he had done on that occasion. It was absolutely necessary for the learned Judge, if he wanted to put before the jury the facts and circumstances in favour of the defence, as he should have done, to place the personal diary of the Sub-Inspector exhibit 10 before the jury. The fact that the prosecution challenged the authenticity of that diary as containing an interpolation and that they pointed out other circumstances which might indicate that it should not be relied upon did not justify the learned Judge in withholding it entirely from the jury. A verdict obtained from the jury without placing before them this important piece of evidence in favour of the defence, whatever may have been its real worth, cannot, in my opinion, possibly be sustained.

The next objection relates to the way in which the learned Judge has recorded in his charge to the jury as to how he had explained the law. The learned Judge states in his heads of charge that he explained certain sections of the Indian Penal Code. But there is nothing to indicate what he stated to the jury or how he explained the different elements constituting the offences. It is urged on behalf of the prosecution that in the heads of charge it is not necessary for the learned Judge to record in full what he actually told the jury and that furthermore the sections of the Indian Penal Code under which the accused persons were tried were not so complicated as to necessitate a record of what the learned Judge might have said to the jury in explaining the law. It is true that it is not in every case that the Judge is bound to state in his charge how he explained the law to the jury. But in a series of decisions of this Court it has been laid down that the charge must be recorded in such a way as would enable this Court sitting as a Court of appeal to judge whether the facts and circumstances of the case had been properly placed before the jury and also whether the law has been correctly explained. I shall refer to a few of such cases. One of them is the case of *Panchu Das v. Emperor* (1) where it has

(1) (1907) I. L. R. 34 Calc. 698

been laid down that it is not only desirable but necessary that the charge should be recorded in an intelligible form, and with sufficient fulness to satisfy the appellate Court that all points of law arising in the case were clearly and correctly explained to the jury. Reference may also be made to the case of *Abbas Peada v. Queen-Empress* (1) and the case of *Hemanta Kumar Pathak v. Emperor* (2). In the present case where there was a charge under section 120 B of the Indian Penal Code and there was a question as to the bona fides or otherwise on the part of the appellant No. 3 as also various other questions of fact it was absolutely necessary to record the charge in such a way as would have enabled this Court to ascertain whether the law has been properly explained to the jury or not in relation to the facts of this particular case and also whether the facts in so far as they bear upon the elements necessary to constitute the offences were properly explained to the jury or not.

The next objection relates to the procedure that was adopted by the learned Judge under the provisions of section 73 of the Evidence Act. It appears that certain letters were produced on behalf of the defence and it was alleged on behalf of the defence that these letters were written by the girl Subhasini. The letters were not proved as having been written or signed by Subhasini. The defence thereupon asked the learned Judge to proceed under the provisions of section 73 of the Evidence Act and to have the handwriting of the girl taken in Court so that the writing in the letters might be compared with the handwriting of the girl taken in Court and also with her admitted or proved writings and signatures. This procedure was adopted by the learned Judge. But from the two orders which the learned Judge recorded, one on the 4th of March 1925 and the other on the 5th March 1925 it appears that all that was placed before the jury were the signatures of the girl as contained in those letters and some admitted signatures of hers. It does not at all appear whether the jury were asked to compare the handwriting of the girl as alleged to have been contained in the letters with what she had written in Court under the Court's direction. The learned counsel appearing on behalf of the Crown urged that so long as the letters were not proved it would not have been proper for the learned Judge to have put these letters before the jury and the question whether the letters were admissible or not was a question for the Judge and not for the jury to decide and

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(1) (1898) I. L. R. 25 Calc. 736.

(2) (1919) I. L. R. 47 Calc. 46.

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inasmuch as the learned Judge thought that it had not been proved that the letters had been written by the girl it was not necessary for him to place those letters before the jury in order to get their opinion whether the letters were written by the girl or not. With all deference to the arguments of the learned counsel in this respect I am not prepared to agree with this contention of his. The defence in order to use these letters as evidence in their favour had to prove that the letters had been written by the girl. For this purpose they could rely upon expert evidence under section 45 of the Evidence Act or the opinion of a competent witness under section 47 of the Act or direct comparison of the letters with proved or admitted documents under section 73 of the Act. This comparison has to be made by the Court or by a witness called for the purpose. If the defence had succeeded in proving by other evidence that the letters had actually been written by the girl there was no point in making the comparison. It is only where such evidence is not available and where although the handwriting in the letters had not been proved by independent evidence to have been the handwriting of the girl that it is necessary to have recourse to the provisions of section 73 of the Evidence Act to see whether by comparison it can be determined whether the letters were written by the girl or not. The issue before the Court in a case like this is whether the girl had written the letters. Taylor in his Book on Evidence says—"It further appears, that any person whose handwriting is in dispute, and who is present in Court, may be required by the Judge to write in his presence, and that such writing may be compared with the document in question. Moreover in all cases of comparison of handwriting the witnesses, the jury and the Court may respectively exercise their judgment on the resemblance of the writings produced, with respect to the general character of the handwriting, the form of the letters, the orthography of the words and the style of the composition and also on the fact of one or more of the documents being written in a feigned hand." The result of this comparison is the determination of an issue arising in the case and is quite distinct from the determination of the question of admissibility or otherwise of evidence, which latter is within the province of the Judge alone. Therefore the learned Judge in not placing before the jury and in not asking them to compare with the writing in the letters the handwriting taken in Court omitted to give the accused persons an opportunity of getting an opinion of the jury on the

question as to whether the letters were really written by the girl or not.

A further objection appears on the face of the charge and that is to the effect that although there were three accused persons and the case as against all the three did not stand on the same footing the learned Judge nowhere asked the jury to consider the case as against each of the accused individually. This in my opinion is also a very serious omission and is likely to have prejudiced the accused persons, having regard to their defences which were not similar but different.

These are some of the more important objections which have been taken to the learned Judge's charge to the jury in this case, and in the face of these objections I am not prepared to hold either that the accused had a fair trial or that there was a proper summing up. In my opinion therefore the verdict of the jury should be set aside and the convictions of and the sentences passed upon the appellants on the basis of that verdict should also be quashed.

The question then arises as to whether there should be a retrial of this case or not. The learned counsel appearing on behalf of the appellant No. 3 has strenuously urged that in view of certain facts which he has placed before us and also of certain circumstances which may lend support to his argument to the effect that the appellant No. 3 acted bona fide it is not necessary for us to send the case back for retrial at least so far as the appellant No. 3 is concerned. We have carefully considered the matter. We do not express any opinion on the merits of the case but in view of the evidence on the record we are not prepared to say that this is a case in which we can substitute our own opinion for the verdict of the jury and we accordingly order that the case against all the three accused should be tried again.

A further question then arises and that is as to where the case should be tried. It is quite clear that in view of the nature of the case, the allegations made on behalf of the respective parties, the length of time that has elapsed since the case was instituted, the fact that the case has been widely talked about and has been discussed in the columns of newspapers and that there has been some agitation over the case in certain quarters, an atmosphere of prejudice has been created locally and possibly in some of the neighbouring districts. It is therefore highly desirable that the case should be tried elsewhere than at Rangpur in order that the accused should have a fair and impartial trial. The accused

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persons desire that the case be tried at Dinajpore and we think that it would be right to accede to their prayer in this respect. We accordingly direct that the retrial ordered above do take place in the Court of Sessions at Dinajpur.

The accused will remain on bail pending their retrial.

Cuming, J. I agree.

A. T. M.

Appeal allowed : Retrial ordered.

APPELLATE CIVIL

Before Mr. Justice Suhrawardy, and Mr. Justice Duval.

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April, 23.

GOPAL CHANDRA BANERJEE

v.

BHUTNATH SASMAL and ANOTHER.*

Ejectment—Permanent lease with condition of re-entry—Lease for residential purpose—Right to take fruit—Transfer of Property Act (IV of 1882), applicability of—Conduct of parties.

At the time of the lease there were on the land in suit only a certain number of fruit trees and by the lease the defendants were to enjoy the land by erecting houses on it and planting, if they so liked, other fruit trees. The provision was that the lease should continue to the defendants' heirs, but there was a further provision that if at any time the lessor should require the land he should give notice to the lessees who would therefore give up the land on receipt of the value of the fruit trees &c :

Held, that as the land was let out for residential purposes with the right to take fruits from the trees on the land and to plant other fruit trees and take their fruits and not for purposes of cultivation, the lease was governed by Transfer of Property Act : *Hedayat v. Kamalanand* (1) and other cases.

The mere fact that there was a right to plant trees or pluck the fruits of trees would not by itself convert a *potta* granted for a residential purpose into a horticultural lease carrying the same rights as an agricultural lease, and so bringing it under the Bengal Tenancy Act.

* Appeal from Appellate Decree No. 1056 of 1923. against the decree of Babu Nalini Kanta Bose, Subordinate Judge, 1st Court, of 24-Parganas, dated the 20th December, 1922, affirming that of Babu Mahendra Nath Mukherji, Munsiff, 2nd Court, at Alipur, dated the 23rd May, 1921.

(1) (1912) 17 C. L. J. 411.

That the land was given to be enjoyed from generation to generation, so long as the landlord did not require it for his own purpose.

That the rights between the parties should be determined on a construction of the lease and the conduct of the parties could not be taken into account after the lease had been entered into.

Appeal by the Plaintiff.

Suit in ejectment and for arrears of rent and damages in respect of a piece of land.

The material facts appear from the judgment.

Mr. Sarat Chandra Roy Chowdhury and *Babu Charu Chandra Bhattacharjee* for the Appellant.

Babu Baranasibashi Mukherjee for the Appearing Respondent.

The judgments of the Court were as follows :

Duval, J : In this case the plaintiff brought a suit in ejectment and for arrears of rent and damages in respect of a piece of land, said to measure one bigha 17 cottas, which was leased to the defendants by a pottah dated the 27th November 1889. The plaintiff's case was that he served on the defendants a notice to quit and determined the lease. The first Court found that the defendants' tenancy was a tenancy under the Bengal Tenancy Act, that notice was not duly served under that Act and that the defendants could not be ejected except under the provisions of section 25 Bengal Tenancy Act. The learned Subordinate Judge on appeal confirmed this order and against his order the present appeal is brought.

Now the main point in this appeal is whether on the construction of the potta this tenure is one which comes under the Bengal Tenancy Act at all or is a tenancy which comes under the provisions of the Transfer of Property Act. It appears that on the land in suit at the time of the lease there were only a certain number of fruit-trees and by the lease the defendants were to enjoy the land by erecting houses on it and planting, if they so liked, other fruit-trees. The provision was that the lease should continue to the defendants' heirs ; but there is a further provision that if at any time the lessor should require the land he would give notice to the lessees who would therefore give up the land on receipt of the value of the fruit-trees &c. It is argued on behalf of the appellant that by the nature of the premises and terms of the lease the parties are governed by the Transfer of Property Act and not by the Bengal Tenancy Act and the lease can therefore be terminated on the terms let out in the potta. For the respondent it is argued that the lease is one governed by the Bengal Tenancy Act and that the defendants have

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acquired a right of occupancy and cannot be ejected. It is clear that the land is not let out for purposes of cultivation. It was let out for residential purposes with the right to take fruit from the trees on the land and to plant other fruit trees and take their fruits. The potta is described as a *basatbati potta* i.e., a potta for residential purposes. Now the mere fact that there is a right to plant trees or pluck the fruits of trees would not by itself convert a potta granted for a residential purposes into a horticultural lease carrying the same rights as an agricultural lease and so bring it under the Bengal Tenancy Act. In this connection I would refer to the case of *Hedayet Ali v. Kamalanand Singh* (1) where it was observed that if a lease is for the purpose of gathering fruits from the trees on the land, the lease is not for horticultural purposes. Again in the unreported case of *Raj Kumar Nali v. Mohesh Chandra Guha* (2) where it was found that after the creation of a lease the defendants possessed the land by enjoying fruits of the trees and that none of the land was under any sort of cultivation and it was held that it could not be said that such land was really let out as subject to the provisions of the Bengal Tenancy Act. I would also refer to the case of *Srimati Sasi Bala Debi v. Srimati Amala Debi* (3) where it was observed that the whole area of a residential holding cannot, ordinarily, be covered with buildings and the fact that the surplus land is planted with fruit bearing trees does not alter the character of holding; and the case was governed by the Transfer of Property Act. On the other hand it is argued on behalf of the defendants that the growing of fruit-trees is a horticultural purpose and so the Bengal Tenancy Act applies. Following the rulings set out above we cannot agree to the respondent's proposition of law on the facts of this case. Lastly it is urged that the lease anyhow is a permanent one owing to the covenant in it that the land will be enjoyed down to sons and grandsons in succession and that the covenant as to the right of re-entry on compensation is a purely personal covenant between the original lessor and the original lessee; and it is argued that as the original lessor is dead and the present plaintiff is only an assignee from him that covenant being a personal one is no longer enforceable. We see no force in this contention. It appears to us that the purpose of the lease was clearly one for residential purposes. Incidentally there was the right to plant trees and take fruits but there was nothing agricultural about the land at

(1) (1912) 17 C. L. J. 411.

(2) (1915) Unreported. S. A. 2371 of 1915 decided on the 19th July.

(3) (1920) 25 C. W. N. 378.

all. As to the terms, it is clear to us that it was given to be enjoyed from generation to generation, so long as the landlord did not require it for his own purposes. He had then, according to the terms of the document, the right to re-enter on giving certain compensation. In this view we must hold that the Bengal Tenancy Act does not apply but that the Transfer of Property Act applies. It was also urged that by their conduct the parties have treated the lease as a permanent one. In a matter of this character, rights as between the parties must be determined on a construction of the lease and we have nothing to do with the conduct of the parties after the lease has once been entered into. In view of these findings it has next to be determined whether the lease has been duly determined by notice. The notice appears to be one served by registered post and is not a notice under the Bengal Tenancy Act. The lower Courts have not considered whether such notice is sufficient under the Transfer of Property Act or is one given in accordance with the terms of the lease. It is necessary therefore to remand the case to the lower appellate Court to come to a finding as to whether in the present suit notice has been duly served or not in accordance with the terms of the lease.

The result is that this appeal is allowed with costs of this Court the decree of the lower appellate Court set aside and the case remanded to that Court to be dealt with in the manner indicated above. Other costs will abide the result.

Suhrawardy, J :—I agree.

A. T. M.

Appeal allowed.

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Duval. J.

APPELLATE CRIMINAL.

*Before Sir Babington Bennett Newbould, Knight, Judge, and
Mr. Justice B. B. Ghose.*

CRIMINAL.

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February, 12.

KERAMAT MANDAL AND ANOTHER

v.

KING-EMPEROR.*

Admissibility—Charge—Misdirection—Criminal Procedure Code (Act V of 1898), Sec. 162—Statement to police officer—Statement of accused—Conduct—Statement of incriminating nature—Allegations of persons not examined—Self-exculpatory statement—Confession—Evidence of general character—Evidence Act (I of 1872), Sec. 155 (4).

A and B were charged under sections 366 and 376 I. P. C. They both committed an offence under section 376. Subsequently the woman was taken by B alone to different places where he alone committed rape upon her :

Held, that although both of the accused persons might have been jointly charged with both the offences, if it was intended to prosecute B with regard to the offences that he was accused of having committed elsewhere there should be separate charges with regard to those offences.

That it was not necessary for the prosecution to establish that the woman was by force compelled to leave not only house but compelled to go to various places in order to sustain the charge under section 366 I. P. C. on which the accused were tried.

Under section 162 of the Code of Criminal Procedure, no statement or any record thereof whether in a police diary or otherwise or any part of such statement made by any person to a police officer in the course of an investigation under chapter XIV of the Code is admissible as evidence except as provided in the second paragraph of that section.

The statements of the accused as conduct are not admissible.

The statements of the accused of incriminating nature are inadmissible.

Allegations to the police officer during search of persons not examined in Court, that the accused was absent from home on the night of the occurrence as to kidnapping, are inadmissible.

A self-exculpatory statement is not a confession.

On a question of rape evidence, as regards the general immoral character of the woman is relevant evidence as enacted in section 155 (4) of the Evidence Act.

*Criminal Appeal No. 568 of 1924, against the order of the Sessions Judge of Rajshahi.

Appeal by the Accused.

The appellants were sentenced to transportation for life under section 376 Indian Penal Code.

The material facts appear from the judgment.

Babu Debendra Narain Bhattacharjee for the Appellants.

Mr. Khondkar (Deputy Legal Remembrancer) for the Crown.

The following judgment was delivered :

The appellants in this case Keramat Mandal and Belat Ali Mandal were tried by the Sessions Judge of Rajshahi with the assistance of a jury on two charges under sections 366 and 376 Indian Penal Code. The jury returned a unanimous verdict of guilty against the first appellant on both charges and a verdict by a majority of four to one of guilty on both charges against Belat Ali. The learned Sessions Judge accepted the verdict and sentenced both the appellants to transportation for life under section 376 Indian Penal Code, no separate sentence being awarded under section 366 Indian Penal Code.

On behalf of the appellants several grounds have been taken the first of which being with reference to mis-joinder of charges. With regard to the first charge under section 366 Indian Penal Code no objection is taken and it appears to us to be quite in order. The difficulty is caused with regard to the second charge which runs thus ; "Secondly that you on or about the 25th day of May 1924 at Dasmari P. S. Paba and other places committed rape on Benodini." The story of the prosecution was that rape was committed on Benodini on a field at Dasmari by both the accused persons. Subsequently this woman was taken either by force or by fraud by Belat Ali alone to different places where he alone committed rape upon her. In this circumstance a joint charge against both the accused of having committed rape upon Benodini at Dasmari and in other places, is improper. We are of opinion that such a charge is also embarrassing. It is urged on behalf of the Crown that although this is not a proper charge this has not in fact occasioned a failure of justice, because if the evidence on behalf of the prosecution as to the first act of rape in the field at Dasmari was believed by the jury, both of the accused persons might be convicted of the offence. It is possible that this is so, but having regard to the other questions on which we consider this trial has been vitiated we think that in the subsequent trial this error in the charge should be set right.

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Although both of the accused persons might have been jointly charged with both the offence which were committed at Dasmari, if it is intended to prosecute Belat Ali with regard to the offences that he was accused of having committed elsewhere there should be separate charges with regard to those offences. While dealing with this matter we may also point out that in his charge to the jury with reference to the offence under section 366 Indian Penal Code the learned Judge has stated this : You shall have to see (a) if the woman Benodini was by force compelled to leave her house and to go to the various places. In our opinion it is not necessary for the prosecution to establish that she was by force compelled to leave not only her house but compelled to go to various places in order to sustain the first charge on which the accused were tried.

The principal question on which we hold that the trial has been vitiated, is of erroneous admission of evidence. The first is that evidence has been admitted as to what Benodini has stated to the investigating police officer and her pointing out the places where she was taken. The statement of another witness, that is, the mother-in-law of Benodini before the police has also been put in evidence. We should point out that under section 162 Criminal Procedure Code no statement or any record thereof whether in a police diary or otherwise or any part of such statement made by any person to a police officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure is admissible as evidence except as provided in the second paragraph of that section. It was urged on behalf of the Crown that the statements that were put in evidence were not corroborative of the facts sworn to the witnesses in the box, but were practically harmless and could not affect the decision as regards the main story of the offences. It is difficult for us to say how it worked on the minds of the jury, and the law forbids such evidence being introduced in the manner it has been done. In this particular case the statements that were made by the witness to the police officer and the fact of pointing out the places to him ought to have been kept back from the jury, as such facts were not brought out in evidence on behalf of the defence as provided by section 162 of the Code. A still more objectionable thing happened in allowing the evidence of the statements of Belat Ali while in custody of the police officer, and of his having pointed out the places where he had taken the woman during the course of the night in which the offence is

alleged to have been committed. Although the learned Judge has stated in the last part of his charge that the jury should reject the evidence as regards the part taken by Belat Ali in pointing out the places, the mischief of introducing inadmissible evidence had already been done. It seems that the learned Judge allowed this evidence to be introduced on the ground that it was the conduct of the accused influenced by a fact in issue. It can hardly be said that the statements of the accused were admissible as his conduct. These statements were certainly of an incriminating nature and were not admissible under the law.

The next objection which is also of substance is that when search was made for Belat Ali two persons Kafil and Suklal were alleged to have said that Belat Ali was absent from home on the night of the occurrence. These two persons have not been examined in Court but their allegations about the absence of Belat Ali were allowed to go in. Those statements were certainly inadmissible. The learned Judge only refers to that fact while dealing with the arguments on behalf of the defence.

On this ground of wrong admission of evidence we must set aside the conviction and sentence and send the case back for retrial according to law. While doing so we desire to make certain observations with regard to the nature of the statement made by Belat Ali to the Magistrate by way of confession. This statement is not really a confession, because so far as it goes it is self-exculpatory. The learned Judge was therefore wrong in using the expression that it was a confession.

The next point is that the learned Judge begins by saying that on a question of rape the character of the woman is not relevant. It seems to us that what the learned Judge means, as he says subsequently, is that even a woman of immoral character may be the subject of rape. In such case evidence as regards the general immoral character of the woman is relevant evidence as enacted in section 155 (4) of the Evidence Act. We noticed that the learned Judge admitted evidence which suggested that the woman concerned in this case was of bad character and he dealt with this matter in his charge. We are of opinion therefore that the learned Judge was quite aware of the provisions of the law, but the use of the expression that the character of the woman is not relevant is somewhat misleading.

The result is that we set aside the conviction and sentence passed on the appellants and send the case back for retrial. The

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accused will be tried on the following charges : On one charge against both the accused under section 366 Indian Penal Code as framed ; one charge against the accused No. 1 Keramat Mandal for committing rape on Benodini at Dasmari ; a separate charge against Belat Ali for committing rape on Benodini at Dasmari ; and if the prosecution so desires a separate charge of rape against Belat Ali for what has been alleged to have taken place subsequent to Benodini being taken away from the field at Dasmari.

A. T. M.

Convictions set aside : Case remanded.

*Before Sir Nalini Ranjan Chatterjea, Knight, Judge, and
Mr. Justice B. B. Ghose.*

KERAMAT MANDAL AND ANOTHER

v.

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CRIMINAL.

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October, 28.

Admissibility—Statement before police officer—Criminal Procedure Code (Act V of 1898), Sec. 162—Evidence Act (I of 1872), Sec. 165—Erroneous admission, not occasioning failure of justice.

A Judge is not entitled to put questions with regard to statements made to the police officer during the course of investigation under chapter XIV of the Code of Criminal Procedure in the exercise of the power conferred upon him by section 165 of the Evidence Act in order to show that the witnesses had made contradictory statements to the police officer and before the Court. To use the statements for this purpose is to contravene the provisions of section 162 of the Code of Criminal Procedure.

The power conferred on a Judge under section 165 of the Evidence Act, cannot be exercised for the purpose of introducing evidence in contravention of the law.

Admitting statement of a witness before the police officer regarding an unimportant matter, having some remote bearing on the question in issue and being contradictory, which not being at all vital, though erroneous but not occasioning failure of justice, is no ground for reversal of the verdict of the jury.

In introducing evidence in a trial with the aid of a jury, a Judge should be very careful in order to avoid miscarriage of justice.

* Criminal Appeal No. 414 of 1925, against the order of the Sessions Judge of Rajshahi.

Appeal by the accused.

The appellants were convicted under sections 366 and 376 Indian Penal Code and sentenced to 10 years' rigorous imprisonment, each under each section, the sentences to run concurrently.

Babus Debendra Narain Bhattacharjee and *Satindra Nath Mukherjee* for the Appellants.

Mr. Khondkar (*Deputy Legal Remembrancer*) for the Crown.

The following judgment was delivered :

This case came up once previously before this Court on which occasion the conviction of the appellants was set aside and the case sent back for retrial on the ground of erroneous admission of inadmissible evidence. This Court gave also certain directions as regards the framing of charges on the retrial. On this occasion also the appellants have been convicted on the unanimous verdict of the jury under sections 366 and 376 Indian Penal Code and sentenced to 10 years rigorous imprisonment, each under each section, the sentences to run concurrently.

On behalf of the appellants it has been contended by their learned vakil that the present trial has also been vitiated on account of the use made by the Sessions Judge of the statements made by witnesses to the Police Officer during the course of investigation under Chapter XIV Criminal Procedure Code in contravention of section 162 of the Code. The learned Judge was of opinion that he was entitled to put questions with regard to those statements in the exercise of the power conferred upon him by section 165 of the Indian Evidence Act in order to show that the witnesses had made contradictory statements to the police officer and before the Court. We have no doubt that the Judge was clearly wrong in making such use of the statements. The power conferred on the Judge under section 165 Evidence Act cannot be exercised for the purpose of introducing evidence in contravention of the law. The last paragraph of section 2 of the Evidence Act leaves the provisions of the Criminal Procedure Code unaffected. Under section 162 Criminal Procedure Code statements made to a police officer are prohibited from being used for any purpose save as provided in the section ; and there is no provision for allowing the Judge to use such statements for confronting the witnesses with them. To use the statements for this purpose was to contravene the provisions of section 162 of the Code. The learned Deputy Legal Remembrancer is unable to support the procedure adopted by the Sessions Judge.

The use of which the learned vakil complains is primarily that

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of the statements made by Sukhlal (P. W. 13) to the police officer which was introduced with the evidence by a question put to the Sub-Inspector by the Judge, that on the night of the occurrence Joyhari and Kailash came to the witness and informed him that Belat, Keramat (the two appellants before us) and a few others had forcibly taken away Adhar's wife from Adhar's *bari*, while he stated in Court that on the night of the occurrence Kailash and Jaihari came to him and said that they suspected Belat and Keramat of having taken away the woman. It is contended that this has occasioned a failure of justice, for if the jury thought that Sukhlal was a truthful witness in the absence of this contradiction, the verdict might have been in favour of the accused. It is urged that the verdict must therefore be set aside and the case sent back for fresh trial. We are not prepared to accept this contention. The statement was with regard to such an unimportant matter and had such a remote bearing on the question in issue, and the contradiction not being at all vital. We are unable to hold that the admission of this evidence could have affected the verdict of the jury in any way. Jaihari and Kailash were not eye witnesses to the occurrence. They only purported to state what they had heard from another witness Radhapyari. Whether they stated that the accused had committed the act or that they had been suspected to have done that act on the night of the occurrence seems to have a very little bearing on the positive evidence given as to the occurrence itself.

It is next urged that Sukhlal had given evidence that Binodini had immoral relations with the appellants Belat and that if this witness had been believed the verdict would have been otherwise. We are unable to accept this contention also for assuming that Binodini was a woman of immoral character, there was no reason whatsoever for her leaving her home for the whole night and leaving a child 5 months old uncared for as there was nothing to prevent her from carrying on the intrigue in the manner as was suggested she used to do before the day of occurrence; nor is there any reason why she should have been found next morning at a distance from the village attempting to find her way home, in the condition in which the witnesses depose to have seen her hair dishevelled, eyes blood-shot and her body and cloth all muddy. There is no doubt therefore that she did not leave her home with the object of keeping an assignation even assuming that Sukhlal's evidence is true. But against this man's evidence, which is merely hearsay, there is the evidence of a large number of co-villagers who swore

that Binodini was of good character, and we have no doubt that the suggestion as to her bad character is unfounded. On the whole we are unable to hold that there has been any failure of justice on account of the erroneous proceeding of the Judge. In this view we are not disposed to reverse the verdict of the jury.

Before parting with this case, we must express our regret that the Sessions Judge has committed this lamentable error which was due to his not considering the recent amendments of the Code more carefully. This has caused us a great deal of trouble and much waste of time and might have caused further waste of public time and money and also harassment of witnesses if we had found it necessary to reverse the verdict of the jury and direct fresh re-trial. The course adopted by the Judge is all the more regrettable because there was adequate and proper evidence in support of the case for the prosecution and the contradiction as the statements sought to be introduced was of no practical value. In introducing evidence in a trial with the aid of a jury the Judge must be very careful in order to avoid miscarriage of justice. With these observations we dismiss the appeal.

A. T. M.

Appeal dismissed.

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PRIVY COUNCIL.

PRESENT.—*Lord Sumner, Lord Blanesburgh, Sir John Edge,
Mr. Ameer Ali, and Lord Salvesen.*

MUSAMMAT FARID-UN-NISA.

0.

MUNSHI MUKHTAR AHMAD AND ANOTHER.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER
OF OUDH.]

*Deed executed by purdanashin lady—Her knowledge of its contents—Sufficiency
of execution—Explanation prior to her execution.*

Where a deed purporting to be executed by a *purdanashin lady* is in dispute, the onus is on those who seek to set it up and to establish that she was fully aware of its contents and purport either prior to its execution, or after it, under such circumstances as show it to be her own mental act and deed, or her adoption and ratification of it with full knowledge and comprehension. And if the deed, as

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presented to her for execution, differs materially, by addition or omission, from the scheme and details which she had previously laid down, the discrepancy ought to be clearly pointed out to her, and its nature and effect fully described.

In the case of an illiterate *pardanashin* lady executing a deed, independent legal advice is not in itself essential. The disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it.

The extent and character of the explanation required must depend upon the circumstances.

Tacoorden Tewary v. Ali H. Khan (1); *Wajid Khan v. Ewas A. Khan* (2); *Sunitabala Debi v. Dhara Sundara Debi* (3); *Kali Baksh Singh v. Ram Gopal Singh* (4); *Sudisht Lal v. Sheobarat Koer* (5); *Sham Koer v. Dakh Koer* (6); *Sajjad Husain v. Wasir A. Khan* (7).

Appeal from a decree of the Court of the Judicial Commissioner (K. Lal and Daniels JJ.) dated the 14th January 1921, which reversed a decree of the Subordinate Judge of Bara Banki (S. Asghar Hassan, Esq.) dated the 30th April 1918, which dismissed the appellant's suit with costs.

The material facts appear from the judgment of their Lordships.

S. Hyam for Appellant.

W. Wallach, for Respondents.

The judgment of the Board was delivered by

Lord Sumner. The plaintiff appellant, having sued to recover possession of a residence and agricultural land at or near Ahmadpur, the Subordinate Judge of Bara Banki passed a decree in her favour against two of the defendants, who are now respondents to this appeal. In the Court of the Judicial Commissioner of Oudh this decree was set aside and the suit was dismissed. The plaintiff had executed a *wakfnama*, covering the property and appointing the respondents *mutawallis* of the *wakf*, and accordingly the claim is in substance to set the deed aside.

At the time of the execution the plaintiff was a married woman, illiterate, childless and *pardanashin*. She and her husband, Sheikh Karim-ud-din, were Mohammedans. Most of the property in question had been given to her upon her marriage by her

(1) (1874 L. R. 1 I. A. 192; 13 B. L. R. 427.

(2) (1891) L. R. 18 I. A. 144; I. L. R. 18 Calc. 545.

(3) (1919) L. R. 46 I. A. 272.

(4) (1913) L. R. 41 I. A. 23; I. L. R. 36 All. 81; 19 C. L. J. 172.

(5) (1881) L. R. 8 I. A. 39; I. L. R. 7 Calc. 245.

(6) (1902) L. R. 29 I. A. 132; I. L. R. 29 Calc. 664.

(7) (1912) L. R. 39 I. A. 156; I. L. R. 34 All. 455; 16 C. L. J. 613.

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maternal grandfather, but the residence, known as the mahal, and some *sir* land, both in the village of Ahmadpur, came to her by inheritance. Since her marriage she had lived there continuously, and, although during the earlier part of their married life her husband was generally absent on Government service, he had retired, and for some years had resided entirely at Ahmadpur. He suffered from incurable disease, had become nearly blind, and was otherwise crippled and incapable, but his mind was not in any way affected.

The defendants, the *mutawallis*, who were in possession, relied upon the *wakfnama* as their title. Its gist was to divest the plaintiff of the whole of her property, which became vested in them, but it reserved to her a life stipend of Rs. 34 per mensem, and another of Rs. 33 per mensem to her husband, and also gave her the right to continue to reside in "The Mahal" for life, the *mutawallis* being bound to keep it in repair, as well as to pay the stipends. They were two brothers, sons of a sister of the plaintiff's husband, to whom he was much attached. Their Lordships do not think it is sufficiently made out that they or either of them had acted as men of business for the appellant, and they put this point aside, but she was on friendly terms with them. It is said that she was at enmity with her own relations, for reasons that do not appear to reflect on her. At any rate, she virtually lived apart from and saw little of them, nor had she, in fact, any support or advice from their side.

Very shortly after the marriage the management of the property was assumed by the plaintiff's husband, her father, who had previously managed it, being now dead, and he continued to manage it as long as he lived. He employed the necessary *karindas* and others for the purpose, and directed the disposition of the rents and profits. Over and above his salary he was himself a man of little or no means. His wife never took part in the management, nor was she shown to have had any business knowledge or experience. From time to time, under the direction of her husband, she executed *muktarnamas* and other documents for estate purposes, but she relied on him entirely as to their necessity and purport. Sums for her personal and household purposes were paid to her with fair regularity, and they seem to have been, though modest, probably sufficient; but she did not direct the whole even of the household expenditure, and her own outlays were on various occasions criticised by her husband and even censured as improvident. There is this to be said, for him, that the estate was encumbered and, when he took up the management, much embarrassed, but in time he considerably

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improved its position. The *wakfnama* enumerates sundry charges outstanding upon it, amounting in all to about Rs. 12,800, with an annual interest of Rs. 730, for the service and discharge of which the *mutawallis* were to provide, and the total value of the property, when settled by the deed, was from Rs. 40,000 to Rs. 50,000, and the income about Rs. 2,500.

The respondents recognised that the burden of proof was on them [*Tacoordeen Tewary's case* (1),] and they accordingly set about to prove her intelligent execution of the deed, its contents having been read and explained to her both upon and after execution. It was not, however, contended that she had had any legal advice about it or any consultation with her own relations. She, on the other hand, raised two answers, the first, that she executed it under actual undue influence of her husband, which dominated her choice and will, and the second, that, when she executed it, she had had no explanation of its nature and contents, but throughout believed it to be an instrument needed for the routine management of the estate, such as she had constantly executed before. A contention, that she had never executed it and that the thumb-mark which it bears is not hers, has not been persisted in.

The probabilities are not unequally balanced. She was a conforming and sincere Mohammedan, though not shown to have been of any exceptional piety. Her husband was a leper, and, even if he lived, as she says she was sure that he would, his management of the estate, at any rate, was nearing its end. The estate was no easy matter to deal with, and the assurance of an income, similar to that which she had hitherto enjoyed, and the continued use of her old home for life, might seem to be a desirable arrangement. She had nothing against the young men who were named as *mutawallis*. They were well known to her, and, as to her own people, it is not pretended that she felt either duty or inclination towards them. A gift of her property to God, with a modest provision for herself and her husband during life, was no bad thing, even though she herself was only about thirty years of age.

On the other hand, her husband had been manager of his wife's property so long that he might quite probably regard it as his own, and certainly he so treated it. He, at least, could not have failed to foresee his death at no distant date, as actually befell within the year. He had no great opinion of his wife's prudence or moderation, and the idea that her property might pass away from him and his must have been repulsive to him. Security for his own

(1) (1874) L. R. 1 I. A. 192 (206).

last days and a provision for his widow, coupled with some acquisition of merit by the performance of a pious act, must have made the idea of a *wakf* attractive to him. Though burdened with religious obligations, the property would, at any rate, be kept in his family.

There is a third probability. It is that the appellant may have been fully acquainted with the scope of the deed, have fully concurred in the creation of the *wakf* for which it provided, and have executed the *wakfnama* freely and with understanding, but have changed her mind, for, after a few months of widowhood and pilgrimage, she married again.

After the fullest examination of the evidence, voluminous even for a case of this kind, their Lordships are of opinion that the *wakfnama* was not executed under actual undue influence of the husband, and that, both before its execution and also shortly after its execution, when it came to be registered, its contents were read over to the appellant and were to some extent explained to her. In what terms that explanation was given the evidence does not show, and its sufficiency becomes the real issue on this appeal.

As for the case of actual undue influence, the husband was not present when the deed was registered, and there is nothing but mere suggestion, derived from the character of the transaction and his marital relation to her, to show that, when it was executed, his will operated on hers at all. In her evidence she declared with spirit that, had she known what the real import of the deed was, she would have refused entreaties and defied threats, and would never have given the smallest portion of her property to him or his relations. There is a ring of truth about this, which must prevail over the ingenious suggestion that, in the circumstances of the case she must be deemed, all unknown to herself, to have been chronically under the hypnotic suggestion or control of her husband, while believing and even glorying in her fancied independence.

Again, their Lordships are not prepared to reject the evidence that the *wakfnama* was explained to the lady before it was executed. It was open to much criticism, and the learned Subordinate Judge refused to believe it, but the evidence had been recorded by his predecessor and he had not seen the witnesses. Their Lordships agree with the learned Judges of the Judicial Commissioner's Court that there is no sufficient ground for its rejection. Taking it, however, as it stands, the question remains whether it goes far enough to satisfy the burthen of proof which rests on the respondents.

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The deed was registered on the 3rd November, 1914. A month or six weeks previously the appellant's husband, Karim-ud-din, being then unable to write or read, sent for his nephew, a young man named Jamal-ud-din, and dictated to him a *wakfnama* word by word. This took five or six hours. The appellant was not present, and Karim-ud-din sent the young man into the house to ask her what salaries she wished to have inserted in the deed. To this she replied by asking whether Karim-ud-din was getting him to write the draft. All this, which is deposed to by Jamal-ud-din, a witness called by the respondents, seems to point to some previous communication on the subject between the husband and the wife, but what it was is not known.

During the previous three years the plaintiff had spoken on several occasions of creating some *wakf*, but full details of her scheme were never given, and once at least she was dissuaded from doing anything at all. Such details as are given show that her ideas then differed substantially from the scheme of the *wakfnama* which was ultimately executed. When Jamal-ud-din told her that a draft was being prepared she proceeded to say (i) that the salaries for herself and her husband were to be within Rs. 100 per mensem; (ii) that certain other things were to be provided for in the deed, namely, that the *rajabi* and *maulud*, which she had celebrated, were to continue to be celebrated as before, that at Moharram *majlis* and *sabils* were to be continued, that other ritual acts should also be performed, and that a *musjid* at Ahmedabad, which her mother's father had built and she herself had always caused to be cleaned and repaired, should be cleaned and repaired as before; (iii) that a plot of land, which she had given to a certain Kabir-ud-din for a house should not be included in the *wakfnama* at all. All this Jamal-ud-din says that he reported to Karim-ud-din, who agreed to the provisions required. He was then sent back to the appellant to ask whether some provision should be made for payment to the *mutawalli*, to which she replied that one-third of the Rs. 100 provided for her husband and herself should be paid to him as his pension. Jamal-ud-din then completed his task and, as far as he remembers, the draft then provided for all the matters which the appellant had required. He placed it in her custody, and to her question replied that all her requirements had been provided for. He did not see the plaintiff again till after the registration of the *wakfnama*, nor did he see the draft again either. In fact, it was never put in evidence, nor did any witness prove that the draft, as it left the hand of Jamal-ud-din, was ever compared with the fair

copy which the plaintiff ultimately executed. The evidence is merely that one, Mustafa Husain, a brother-in-law of the defendants, engaged a person named Wazir-ud-din to make a fair copy of this draft, because he could write a good hand, and, on getting the draft from the plaintiff, read it over and he says, apparently from memory two years afterwards, that this draft and the draft ultimately executed were the same, except for the mention of a debt to Wazir-ud-din of Rs. 400 for procuring the necessary stamped paper, a matter only arranged after Jamal-ud-din's draft was prepared.

All this is absolutely denied by the plaintiff, but, as the whole of her evidence cannot be true, and as the evidence given by Jamal-ud-din and Mustafa Husain is confirmed by other witnesses, their Lordships accept this story generally.

The form of the deed itself thereupon becomes of some importance. It is lucidly and logically drafted, with much more of a lawyer's phraseology and orderly arrangement and much less of a laymen's irrelevance and colloquialism, than such deeds in India often contain. It differs, however, from the account given by Jamal-ud-din in several particulars, and no one suggests that, between the time when he gave her his draft and the time when Wazir-ud-din read over his fair copy to her before she executed it, she was ever told of any departure from the terms, in which her wishes had originally been expressed.

The following differences are material. Clause 1 states that the plaintiff appoints the first defendant, "whom I have brought up and treated as my son," to the office of *mutawalli*, and continues "from to-day I have put Mukhtar Ahmad and Iftikhar Ahmad in possession of the said property as *mutawallis*." As a matter of fact, this admittedly was an afterthought. Mukhtar Ahmad, the first defendant, on hearing of the *wakf* (though not from the plaintiff) said that, as he was busy, he wished his younger brother Iftikhar to be joined as a *mutawalli*. Accordingly this was done, and as, by a subsequent clause, No. 12, each *mutawalli* was to have Rs. 33 per mensem, the sum of Rs. 100, which the plaintiff had fixed to cover the stipends of herself, her husband, and the one *mutawalli*, whom alone she had in view, now became an aggregate of monthly stipends of Rs. 133.

Clause 20 specified how "the *mutawalli*" was to expend the surplus income, after payment of Government revenue, the expenses mentioned, and all other necessary expenses as to the management. He was to do so "after taking into consideration the then existing circumstances of the *wakf* property and as to what sum is reason-

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able to spend, when and on one or more of the following purposes"—twelve in number. The purposes, except "repairs of the mosque in Ahmadpur," are expressed in general terms. The last sweeps in "other expenses on pious objects, which may come up." Subsequent provisions give further powers "beside these expenses... to spend money or [Query "on"] anything without the permission of the authority for the time being having power to interfere with the affairs of the *wakf*," and "if any of the objects mentioned in clause 20 is void in law the *mutawalli* shall spend the money on any other 'legal object' (clause 21). Among the twelve objects particularly named there occur quite generally some of the pious purposes named by the appellant to Jamal-ud-din though one is omitted. In no case is there mention of the continuance of those ceremonies, which the appellant herself had performed. The objects supported by the *mutawalli* under these denominations might in his discretion be wholly divorced from those which the plaintiff had prescribed, and might be entirely unconnected with her or her place of residence in Ahmadpur. The question at once arises, "Was the appellant ever really made aware of these discrepancies, and did she assent to them?"

As a formally valid instrument the *wakfnama* itself is not impugned, and their Lordships therefore do not criticise it. The real question is, whether the appellant was so made cognisant of its contents and purport that it can be said, that the respondents have discharged the onus of showing that she understood it so as to make it her deed.

The law of India contains well-known principles for the protection of persons, who transfer their property to their own disadvantage, when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind. That the instrument here is a *wakfnama* is a mere accident, and the general and well-settled law of *wakf* is not in question. The case of an illiterate *pardahnashin* lady, denuding herself of a large proportion of her property without professional or independent advice, is one on which there is much authority. Independent legal advice is not in itself essential [*Kali Buhsh*

Singh's case (1)]. After all, advice, if given, might have been bad advice, or the settlor might have insisted on disregarding it. The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it [*Wajid Khan's* case (2); *Sunitabala Debi's* case (3)]. The appellant clearly had no such advice, nor is it contended that she had. If, however, the settlor's freedom and comprehension can be otherwise established, or if, as is the respondent's case here, the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor, and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice. If the settlor really understands and means to make the transfer, it is not required that someone should have tried to persuade her to the contrary. Again, the question arises how the state of the settlor's mind is to be proved. That the parties to prove it are the parties who set up and rely on the deed is clear. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension: *Sudisht Lal's* case (4); *Sham Koer's* case (5); *Sajjid Husain's* case (6). Further, the whole doctrine involves the view that mere execution by such a person, although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executant. Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the settlor and, where necessary, explained. If it is in a language which she does not understand, it must, of course, be translated, and it is to be remembered that the clearness of the meaning of the deed will suffer in the process. The extent and character of the explanation required must depend on the circumstances. Length, intricacy, the number and complexity of the dispositions, or the unfamiliarity of the subject-matter, are all reasons for requiring an increased amount and efficiency of explanation. Thus a matter not likely to attract the attention of the executant in itself ought not to be relied on as binding, unless her attention has been directly drawn to it [*Sham Koer's* case (7)].

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(1) (1913) L. R. 41 I. A. 23.

(3) (1919) L. R. 46 I. A. 272 (278).

(5) (1902) L. R. 29 I. A. 132.

(7) (1902) L. R. 29 I. A. 132 (137).

(2) (1891) L. R. 18 I. A. 144 (148).

(4) (1881) L. R. 8 I. A. 39 (43).

(6) (1912) L. R. 39 I. A. 156.

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So if the deed, as presented for execution, differs substantially, either by way of addition or of omission, from the scheme and details which the intending settlor has previously laid down, the discrepancy ought to be clearly pointed out and its nature and effect should be fully described, unless, which must be rare, the difference is so obvious that even a person in the settlor's position must perceive and appreciate it for herself. If the description and explanation have been partial or erroneous, or have not been given at all, the question will then arise, as it arises where there has been no independent legal advice, whether, if proper information had been given, it would have affected the mind of the executant in completing the deed. On the other hand, the doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the settlor, subsequently made, that she had not understood what she was doing obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them. Of course fraud, duress and actual undue influence are separate matters.

In the present case it is quite clear that certain matters were not brought to the appellant's notice before the deed was executed, or at all. Not only was a second *mutawalli* with an additional salary introduced into the draft which was executed, but it made no provision for the settlor's desires as to the maintenance and repair of the mosque in Ahmadpur and as to the various religious ceremonies mentioned by her to Jamal-ud-din, beyond including them among the objects on which the *mutawallis* might expend the *wakf* funds, if and so far as they thought proper. As the deed stands, the *mutawallis* could decline to continue any of the special pious observances which the appellant desired to continue, and could leave her to maintain them herself out of her diminished income and to die in the knowledge that, with her, these objects would have no one left to care for them.

Their Lordships cannot regard these matters as insignificant or such as the plaintiff could reasonably be supposed not to insist upon. She was a woman of property, who had lived all her married life in her own family-house, hard by, as it would seem, to the mosque erected by her relations. Hers had been a lonely and restricted

existence. Karim-ud-din, as a husband, was in many respects a very disappointing person. His own means were small, and for many years his official duties caused him to reside at a distance. She was herself piously disposed, and it was eminently natural in such a woman under such circumstances that she should attach importance to the instructions, which she gave to her husband through Jamal-ud-din. Her piety may well have manifested itself primarily in her care for the mosque, which her family had founded, and for the celebration of the observances to which she herself had diligently attended. If she had really appreciated that in none of these cases was that perpetual continuance assured, which was evidently dear to her mind, their Lordships are far from being satisfied that she would have patiently submitted to her disappointment and have accepted intelligently and without a word the surrender of her own preferences to the discretion of the *mutawallis*. The only prudent and probable conclusion is that, as the words were read over to her, she failed, very naturally, to observe the change. She would hear mention of the mosque and of nearly all the ceremonies by name, and would easily miss the difference between the inclusion of these objects in the powers of the *mutawallis* and the prescription of these objects as obligatory charities to be maintained by the *mutawallis* in any event. They are confirmed in this view by observing that, until a late stage in the argument before the Board, this precise discrepancy between the first draft of the *wakf-nama* and its ultimate form had not attracted the attention of anybody, either in the Courts below or on this appeal. No doubt, where so many other points were in contest, this one might well pass unobserved, but this circumstance only makes it the more likely that the appellant could not herself detect what has, in fact, eluded the vigilance of the counsel and Judges during two protracted hearings. It is not proved when or by whom the original draft was remodelled. There is no evidence that Wazir-ud-din so much as knew that the appellant had given any particular instructions before the scheme was put into writing, and he could not draw the appellant's special attention to something that he never knew. Upon the story told by the respondents' witnesses there never was any chance that those, who explained the deed, should point out these matters, and it is certainly not enough to say that, if the appellant cared about them, she should herself have asked about them, especially as the form of the deed was such as might well have misled her into taking it for a provision of all that she desired. From this point of view the appellant's subsequent action does not assist the respondents.

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Registration and mutation were promptly asked for by those interested in supporting the deed, and the plaintiff herself attended the proceedings without protest. These circumstances are in themselves very favourable to the respondents' case, but the registering officer, who says that he read and explained the deed to her, knew as little of the above-mentioned discrepancies as did Wazir-ud-din, and the appellant's answers are quite consistent with her being in ignorance of a change, of which no one had informed her. As the respondents have to bear the onus of bringing home to her mind the actual import of the deed, they cannot rely on the fact that the appellant's own evidence is untrustworthy, for it is by the evidence of their own witnesses alone that this defect is established, and by that evidence they must stand. The conclusion that they have failed to discharge the burthen of proof is one arrived at not out of any consideration for this lady in particular, but in defence of those strict rules which have been laid down for the protection of the defenceless in India, and it is a matter of obligation upon their Lordships to be strict and unwavering about it. They will accordingly humbly advise His Majesty that the appeal should be allowed, and that the decree passed by the learned Subordinate Judge should be restored with costs here and in both Courts below.

Barrow, Rogers & Nevill : Solicitors for Appellant.

T. L. Wilson & Co : Solicitors for Respondents.

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Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Gregory (sitting with an assessor Mr. A. H. Thackwell.)

INDIAN VACUUM BRAKE CO. LTD.

v.

E. S. LUARD.*

Patent—Revocation—Patents and Designs Act (II of 1911), Sec. 26—'Utility'—'Novelty'—'Invention'—Patent for making in one piece.

In patent law the term 'utility' is used, not in the abstract, but in a very special sense. Mere usefulness is not sufficient to support a patent.

To be new in the patent sense, the novelty must show invention: *Blakey v. Latham* (1).

Patents for making in one piece, articles, previously made in two or more pieces have generally been held invalid.

Petition under section 26 of the Patent and Designs Act for the revocation of a patent granted to the respondent.

The material facts appear from the judgment.

Mr. S. N. Bannerjee (with him Mr. A. K. Roy) for the Opposite Party: The two points for determination are: Firstly, Is what Mr. Luard has done *useful*; secondly, Is it something *new*? I submit that it is useful as the petitioner's own witness has admitted that Mr. Luard's combination of valve-ball is just as useful as the petitioner's. It is well settled that a slight amount of utility will be sufficient to support a patent: *Frosts on Patent Law*, 4th Edition Page 161. The evidence shows that it is an *improvement* as it has got a lesser number of parts than the petitioner's combination, therefore it amounts to an *invention* and consequently it is patentable. In the third place as Mr. Luard's combination gives the public a useful choice between two things which do the same work his combination is patentable: *Fletcher Moulton on Patents* (1913) Page 79.

Mr. P. N. Chatterjee (with him Mr. C. Bagram) for the Petitioner, The Vacuum Brake Company: My learned friend seems to be labouring under two fallacies: First, he seems to think that the word "Use" means utility and that because my witness has admitted that Mr. Luard's article is just as useful as the article manufactured by the petitioner therefore Mr. Luard's article must be patentable. But in Patent Law the term "useful" means "of

*Original Civil Application in the matter of Indian Patent and Designs Act.
(1) (1888) 6 R. P. C. 184 (187).

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more use than what has gone before," and unless an alleged invention claims and proves itself to be *more useful* than what has gone before, no patent will be granted: Grove J's definition in *Young v. Rosenthal* (1) practically adopted by Buckley J. in *Walsbach v. New Incandescent Co.* (2).

Secondly, my learned friend seems to think that because Mr. Luard's article is some sort of a new combination therefore it must be patentable, but the law is otherwise, for it lays down that it is not every novelty which is useful that can be the subject matter of a patent. A thing is not patentable merely because it is new and useful and has not been made before; to be patentable the novelty must show invention: *Harwood v. G. N. Ry. Co.* (3); *Rickman v. Thierry* (4); *Blakey v. Latham* (5); *Longbottom v. Shaw* (6). Here there is no invention.

As to the third point in considering whether a new article is an *invention* it is important to consider whether the new article produces a result never obtained before, or produces an old result in a better or cheaper way, or *merely furnishes a useful variant for obtaining an old result*. In any of these cases the article *may* be patentable, but naturally the Courts are more apt to find invention in an article which produces a result never obtained before or which produces a better or cheaper result than in one which merely furnishes a *mere useful variant*. [Vide Fletcher Moulton on Patents (1913) P. 37].

The following judgment was delivered:

July, 14.

Gregory J: This is a petition under section 26 of the Patents and Designs Act (II. of 1911) for the revocation of a patent granted to the respondent on the 21st. March 1922 by the Controller of Patents and Designs, Calcutta. At the request of the parties this case has been tried with the aid of an assessor Mr. A. H. Thackwell, Works Manager East Indian Railways Carriage and Wagon Workshops Lilooah and I desire to acknowledge his assistance to me. The petitioner is the Vacuum Brake Co Ltd. who carry on business in the manufacture and sale of Vacuum Brake fittings for railway locomotives and rolling stock. The respondent is an Engineer and is a Director of the Consolidated Brake and Engineering Co. Ltd. manufacturers of Vacuum Brakes. The petitioner for many years, in the business of the Company, imported from the

(1) (1884) 1 R. P. C. 29 (33, 41).

(3) (1865) 11 H. L. C. 654 (682).

(5) (1888) 6 R. P. C. 187.

(2) (1900) 1 Ch. 843.

(4) (1896) 84 R. P. C. 105 (H. L.).

(6) (1891) 8 R. P. C. 333 (H. L.).

factory in England and sold in British India, Vacuum brake cylinders described as having the valve chamber mounted in the inner side of the piston according to designs No. 14153 dated 2nd. November 1909 and No. 14678 dated 23rd. April 1910. These designs were published, and have been publicly known in British India since 1910. The petitioner also claims to be the assignee of a patent known as "Hardy's Patent" being British Letters Patent No. 5864 of 1905. This also was publicly known, and published in India, and vacuum brake cylinders according to that patent have been publicly used in India.

On the 21st. February 1922 the respondent applied for and obtained in England a patent relating to the pistons of vacuum brake cylinders identical with the one in the present suit. That patent was No. 5099 of 1922. On appeal however by the present petitioner, the patent 5099 was cancelled on the 31st. July 1924 by the Solicitor General who held the view that it disclosed no invention. In the meanwhile, on the 21st. March 1922, the respondent had applied in Calcutta to the Controller of Patents for a patent of the same device. The application was opposed by the petitioner, but it was accepted on the 11th. June 1922, and Patent No. 8018 dated 21st. March 1922, the subject matter of the present suit, was granted. On the 10th. December 1923 the respondent applied to the Patent Office in Calcutta for an amendment of his Specification No. 8018 of 21st March 1922. The amendments asked for were allowed subject to the insertion of a disclaimer in the Specification relating to British Specification 5864 of 1905, and in consequence of this, the present proceedings were instituted for a revocation of the patent.

The Specification relating to Hardy's patent is marked as Exhibit A in this case, and the drawings show some examples of forms of construction of the invention. Specimens of the petitioner's design 14153 of 1909 and 14678 of 1910 are marked C and D respectively. The only difference between these two lies in the method of attachment to the vertical wall of the piston. The respondent's Specification 8018 accompanied with the drawings is marked F. I. I think there can be no doubt that both in the working principle, and general character of construction, the petitioner's designs and the respondent's patent are founded on Hardy's patent. It is material in the present case to observe that the ball valve in this patent of 1905 is attached to the inner wall of the piston, and Figure 2 shows a removeable seating at the bottom of the valve. If the nuts are removed from the bolts, the ball seat below and the

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ball come away. The ball can be let in either from above or below, and in the type shown in figure 4, from the side. In the respondent's patent the ball valve, as it is in Hardy's patent, is attached to the piston wall inside the cylinder. The valve consists of the body with the screw plug underneath, and the ball inside the body rests on the plug which is put in position from below, and which is removeable by unscrewing it; so both in Hardy's patent and in the petitioner's design the ball rests on a removeable seating. Exhibit E a model which has been used in this case to show the general character of the construction and principle of the respondent's ball valve. It is not an exact model, but it shows the principle. Later, during the case, a specimen of the respondent's ball valve, in section, was secured by Mr. Thackwell, the Assessor, and at the request of the respondent's counsel it was marked as Exhibit 1. The petitioner's designs C and D as already stated are identical. Type C is attached to the inner wall of the piston by 2 studs and nuts, and Type D is attached to the inner wall of the piston by the valve being screwed in. The ball valve consists of the valve body, the ball seating which is screwed in, the ball which is contained in a smaller cage, and a screw plug which closes the top of the body. It has been proved, and it is not disputed, that the petitioner's ball valve type Exhibit D has been in use on Indian Railways many years, and long prior to the grant of Patent 8018 to the respondent, and the present application for a revocation of that patent is made on the ground that it is of no utility and that it is not a new invention, within the meaning of the patent law. The patent is also attacked on the ground that it was anticipated by Hardy's patent. It is important therefore to see the interpretation placed by the Courts on the terms "utility", "novelty", and "invention". The cases show that in patent law the term "utility" is used, not in the abstract, but in a very special sense. Mere usefulness is not sufficient to support a patent. In the case of *Young and Neilson v. Rosenthal & Co.*, (1) Grove J, in charging the jury described "utility" as meaning an invention better than the preceding knowledge of the trade as to a particular article. As to the meaning of "novelty" and "invention", Lord Westbury, in the case of *Harwood v. Great Northern Railway Co.* (2) said "you cannot have a patent for a well known mechanical contrivance merely when it is applied in a manner or to a purpose, which is not quite the same, but is analogous to the manner or the purpose in or to which it has been hitherto notoriously used." In citing this

(1) (1884) 1 Pat. Ca. 1.

(2) (1865) 11 H. L. C. 654 (682).

rule in *Richmann v. Thierry* (1). Lord Davey said "It is not enough that the purpose is new or that there is novelty in the application, so that the article produced is in that sense new, but there must be some novelty in the mode of application. By that I understand, that in adopting the old contrivance to the new purpose, there must be difficulties to be overcome, requiring what is called invention, or there must be some ingenuity in the mode of making the adaption" and Cotton L. J. in *Blakey v. Latham* (2) laid down that to be new in the patent sense, the novelty must show invention; see also Fletcher Moulton on Patents p 21.

Three witnesses have been called on behalf of the parties. Mr. Cook, a District Carriage and Wagon Superintendent on the Bengal Nagpur Railway, and Mr. Remfry an Engineer and Patent Agent on behalf of the petitioner, and Mr. Bwyne an Engineer in the employment of the Consolidated Brake and Engineering Co. Ltd. on behalf of the respondent. Mr. Luard is a Director of this company and was the Managing Director when Mr. Bwyne came out to India in 1923. The evidence of Mr. Cook and Mr. Remfry, generally speaking, is to the effect that they cannot find anything new in the respondent's ball valve or any improvement on that of the petitioner's. It is common ground that the principle is the same, and the valves function exactly alike. Mr. Bwyne says that the essential difference between the two is the simplicity of the respondent's ball valve which has fewer parts; the ball seat being combined with the plug. I do not think that this in itself is enough to support a patent. Many cases are collected in Fletcher Moulton on Patents P. 39 where it is stated that patents for making in one piece, articles, previously made in two or more pieces, have generally been held invalid. I have been unable to see what advantage results from this and I cannot regard it as an invention. Mr. Luard, in an affidavit that has been referred to, says, in paragraph 4, that his patent differs from the petitioner's designs in two features which are claimed by him to be of great value. One of these features is that the valve seat can be removed without first removing that ball, and that upon removing the valve seat for the purpose of inspection, cleaning or removal, the ball is simultaneously removed. The first part of this statement suggests that the ball can be left in the valve chamber after the valve seat has been removed. As a matter of fact it cannot. As soon as the ball seat is removed, the ball falls out, and the latter portion of Mr. Luard's statement shows that this is so. In my opinion there is no substance in the

(1) (1896) 14 Pat. Ca. 105 (121).

(2) (1888) 6 Pat. Ca. 184, 187.

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the point made. For the purpose of inspecting or cleaning the valve seat, in Mr. Luard's design, the screw plug underneath is removed and the ball falls out; and in the petitioner's construction the screw plug at the top is removed and the small cage containing the ball is taken out. Even for the purpose of grinding the valve seat, which is done according to Mr. Cook about once in 5 years, and according to Mr. Bwyne about once every year, it is not necessary for the valve seat in the petitioner's construction to be taken out. The overhauling of the ball valve is so occasional, that if Mr. Luard's design showed any greater convenience, which I have been unable to find, it would not be one of value. The other feature claimed to be valuable is that the ball is properly located within the valve chamber without the provision of a cage which Mr. Luard says may possibly be omitted when replacing the parts. As there is no greater likelihood of the cage not being replaced than there is of the ball not being replaced in the chamber in Mr. Luard's construction, there is no substance in the advantage he claims inferentially for his own design. Mr. Luard is mistaken if he suggests that the cage is necessary to keep the ball in position. The evidence of Mr. Cook and Mr. Remfry shows that the absence of the cage would make no difference to the working of the valve, for the ball must come into position as soon as the screw plug at the top is screwed down properly. The cage is merely a convenient receptacle for the ball, which is taken out simply by lifting out the cage. In this connection, Mr. Luard has made a statement in his amended specification to which exception has, and I think justly, been taken. Referring to the petitioner's construction Mr. Luard says "in removing the screw plug the ball must be removed with some difficulty." If Mr. Luard had seen a specimen of the petitioner's ball valve, it should have been patent to him that the ball comes away in the cage, and that his statement was misleading. With reference then to the special features in patent 8018 mentioned by Mr. Luard, I am unable, for the reasons I have given, to take his view of their valve. From the point of view of convenience, it has been said on behalf of the petitioner that it is much easier to get at the screw plug when placed at the top of the ball valve, as in the petitioner's designs, than when it is placed underneath, and is practically unseen, as in patent 8018. Both Mr. Cook and Mr. Remfry say this, but Mr. Bwyne thinks it is equally easy in either case. Such judgment as I am able to form on this particular point, does not lead me to agree with Mr. Bwyne. There is one more point in Mr. Bwyne's evidence I shall refer to before stating

my conclusions in this case. Mr. Bwyne says that welding the ball valve after it has been fixed to the piston wall, eliminates a possible source of leakage of air at the place of attachment. I do not think it can be contended that there is any invention in this. Mr. Bwyne concedes there is no novelty in welding, and there can be no question that welding could be applied equally well in the case of the petitioner's ball valves if it were considered an advantage. The possible consequences, however, of fixing the ball valve in the manner described by Mr. Bwyne, preparatory to the welding have been criticised as serious. Mr. Bwyne says that the ball valve is attached to the vertical wall of the piston by drilling a hole in the piston wall to receive the turned portion of the valve, and, as the whole is drilled smaller than the turned portion of the valve, it is necessary to drive the valve into position by the use of a hammer, after which the welding is done. When at the assessor's instance he was asked what would happen if a considerable degree of force were used, he said this would not be permitted; but that if a considerable degree of force was used, there would be every likelihood of injuring the piston wall. Mr. Bwyne's evidence further shows that if for any cause it become necessary to remove the valve body the welding would have to be chipped away by hammer and chisel and the ball valve driven out, and the effect of his evidence is that there would be some slight damage to the inside of the piston wall, but he says that it would not be material if reasonable care were used. Mr. Remfry says that injury to the piston wall would mean injury to the piston itself. Mr. Cook was not cross-examined on this question. The evidence altogether leaves the impression on my mind that the welding process, taken as a whole, is not unattended with danger to the piston. I do not find in Mr. Luard's specification or affidavit, a claim to any speciality in the process, and it does not impress me as a valuable feature of the patent. As stated before the evidence shows, and it is not disputed, that type D of 1910 of the petitioner's designs has been in use on Indian Railways for many years prior to the grant of patent 8018. Mr. Cook has many years' practical experience of Vacuum brakes and is well acquainted with the construction and working of the petitioner's ball valve type D and he is a witness unconnected in any way with the parties. He was unable to find anything new, or, from the point of view of practical utility, anything more useful in Mr. Luard's patent. After giving my best consideration to the several matters on which evidence has been given and the question raised in this case with reference to both Mr. Luard's patent and the petitioner's design,

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I have come to the conclusion that in no respect is the patent 8018 an improvement on, or more useful or better than, the petitioner's design. In my judgment it is not, as claimed, an improved vacuum brake piston and so far as I can see there is nothing new, in the sense of novelty, in the patent, and it discloses no invention. Furthermore, in my view, in material features, the patent was anticipated by Hardy's Patent. Applying the principles laid down in the cases cited, I am of opinion that the patent No. 8018 of the 21st. March 1922 granted to Mr. Luard the respondent with the amended Specification relating thereto, ought to be revoked, and I give judgment accordingly in favour of the petitioner. The respondent must pay the petitioner's costs in these proceedings. The Taxing Officer will on taxation fix what allowance can reasonably be made to the expert witnesses in the suit, viz Messrs. Cook, Remfry and Bwyne for qualifying themselves for the purposes of giving evidence and also for their attendance in Court; the amount to be fixed by the Taxing Officer in his discretion. Under section 35 of the Patents and Designs Act I fix the remuneration of the assessor at Rs. 100 per diem. This item will not be chargeable to the parties.

R. Remfry : Solicitor for the Petitioner.

P. L. Mullick : Solicitor for the Opposite Party.

A. T. M.

Patent revoked.

CRIMINAL REVISION.

*Before Sir Nalini Ranjan Chatterjea, Knight, Judge, and
Mr. Justice B. B. Ghose.*

LALIT KUMAR SEN

v.

KING-EMPEROR *

Appeal—Summary dismissal after calling for record.—Criminal Procedure Code (Act V of 1898), Section 421.

After the record was sent for and received, the appellate Court should hear the pleader and should not dismiss the appeal summarily without hearing him.

Application for Revision under section 435 of the Code of Criminal Procedure by the Accused.

The petitioner was convicted and sentenced under sections 325 and 147 Indian Penal Code to one month's rigorous imprisonment and to pay a fine of Rs. 50 in default to two months' rigorous imprisonment more under section 325 Indian Penal Code.

The material facts appear from the following judgment of the primary Court :

The case for the prosecution is briefly this :—

On the 7th. of May 1925 this accused and many others uprooted vegetables from the land of P. W. I Sarada Charan Sen. Sarada protested and upon this was assaulted by several Mahomedans. Sarada then sat down. His brother's wife Monmobini came to his help. She too was assaulted by the present accused Lalit Sen. Many people gathered, accused and his men decamped. Accused's land and complainant's are contiguous. But accused does not usually reside at home. On the day in question he, however, had ordered his men to pluck vegetable from complainant's land which led to the assault, Accused and complainant have been on bad terms since a long time. The accused denied the charge. The defence case is that the accused was on the day in question and at about the hour of occurrence at Barisal playing cards in the house of a Kaviraj and that therefore he could not have assaulted the complainant or his brother's wife. The defence further alleges that on the day in question complainant Sarada had climbed up accused's tree and accused's man Hasan came and protested. The branch of the tree upon which the complainant

* Criminal Revision No. 697 of 1925, against the order of W. H. Carter Esq., Sessions Judge of Backerganj, dated the 3rd. August, 1925, affirming that of Mr. S. M. Murshed, Deputy Magistrate of Barisal, dated the 23rd July, 1925.

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was sitting fell down—a woman was standing below; and she was hurt by the falling of the complainant on her. On the next day one Hasan appears to have lodged an information to that effect.

Now from the medical evidence it appears that the defence case as regards Sarada's falling from a tree and in consequence Monmohini's receiving injuries is entirely untenable. The defence witness Hasan who says he saw Sarada falling from the tree on Monmohini is a liar and I reject his evidence as unreliable. This man caused an entry in Police Diary to this effect on the next date. Apparently this was done as an answer to a charge against the accused, for, ordinarily one does not rush to *thana* to inform that a man came a cropper from a tree. This would be puerile.

From the doctor's evidence therefore it appears that Monmohini and Sarada sustained serious injuries—and the only explanation consistent with the medical opinion that can be given of these injuries lies in the assumption that both of these persons were assaulted severely by some person or other. Now, prosecution allege the accused and others to be the assailants. On this point there is ample evidence on record to show that this accused and others assaulted Sarada and Monmohini. This accused is alleged to have assaulted Monmohini.

As I have observed above, the injuries on Monmohini and the medical opinion thereon prove that she was wounded by some person or persons. Prosecution proves the accused to be assailants whereas defence has given out a different explanation of the assault which is not only highly improbable but wholly untrue. Thus the only inference that can be drawn about the course of the assault on Monmohini is that the present accused did assault her.

Accused has sought to prove an alibi in his behalf. 4 witnesses have given evidence to the effect that accused was on the day in question and at about the time of occurrence playing cards in Barisal, which is, as I find from the F. I. R. 6 miles away from the place of occurrence—thus showing the impracticability of accused's having done the crime. These witnesses have all deposed from their memory as regards the date. I am not prepared to accept the accuracy of the statement. Human memory in regard to dates is usually very slippery. It is almost impossible to remember the date on which a particular occurrence of not an unusual importance took place and I would therefore treat the evidence of these gentlemen as regards the date as being unreliable. None of these witnesses mention any special reasons for remembering the fact

that the accused played cards on the 24th of Baisakh last. There is no reason for supposing that the playing of the cards did not take place either a day previous to or a day after the 24th Baisakh. These witnesses are evidently friends of the accused, and it is not unlikely that they have allowed their sense of friendship to outrun their veracity. Their evidence is that accused was playing cards at the Kaviraj's house after 4 p.m. This is not usually the time at which people play cards and much less is it the time to commence playing; considering these, I am inclined to think that the story of accused's playing cards on the date of occurrence, is an invention.

For the prosecution there are witnesses who have doubtlessly proved the accused's complicity; but even accepting defence criticism as regards their veracity the circumstance of the case would alone bring home the guilt to the accused. Monmohini is a respectable old lady. I do not think that she would falsely name as her assailant one who did not assault her and much less would she dare to name as her assailant one who was absent. If accused were not at all present at the scene of occurrence, it is highly improbable that he would have been named by complainant as one of the assailants for fear of being detected.

Considering these circumstances I am clearly of opinion that this accused along with many others, formed themselves into an unlawful assembly and in prosecution of their common object, viz to assault complainant and others, to commit mischief, did assault Sarada and Monmohini. From the medical evidence it appears that Monmohini sustained grievous hurt and the evidence on record shows that the present accused only had assaulted her. It follows that Lalit caused the grievous hurt by causing fracture of Monmohini's forearm. It is worth noting here that in cross-examination of Monmohini (P. W. 7) it was suggested that Lalit was provoked by Monmohini to commit the assault. But the case of defence later on developed along a different line. This would also shew that the *alibi* is a mere invention.

Babu Suresh Chandra Taluqdar for the Petitioner.

Babu Aswini Kumer Ghose for the Opposite Party.

The following judgment was delivered:

After the record was sent for and received, the learned Sessions Judge ought to have heard the pleader and ought not to have dismissed the appeal summarily without hearing him. The order dismissing the appeal summarily is accordingly set aside and the appeal is sent back to him to be reheard according to law.

A. T. M.

Case sent back.

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*Before Sir Nalini Ranjan Chatterjea, Knight, Judge, and
Mr. Justice B. B. Ghose.*

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SURENDRA NATH GHOSE AND OTHERS.

v.

KING-EMPEROR.*

*Appeal—Summary dismissal—Criminal Procedure Code (Act V of 1908), Sec.
421—Record sent for.*

Under section 421 of the Code of Criminal Procedure, after the arrival of the record, the appellant is entitled to be heard in support of this appeal. The appellate Court has the power to dismiss an appeal summarily on receiving the petition and perusing the same but not after the arrival of the record.

Application for Revision under section 439 of the Code of Criminal Procedure by the Accused.

The accused were found guilty under sections 447 and 379 Indian Penal Code; the accused Surendra was sentenced to pay a fine of Rs. 50 under section 447 Indian Penal Code, in default to undergo 5 weeks' rigorous imprisonment and to pay a fine of Rs. 100 under section 379 Indian Penal Code, in default to 3 months' rigorous imprisonment; the accused Umar Ali and Imam Hossain were sentenced to 2 months' rigorous imprisonment each under section 379 Indian Penal Code and also to 15 days rigorous imprisonment under section 447 Indian Penal Code, the sentences running concurrently.

The material facts appear from the following judgment of the primary Court :

The case for the prosecution is briefly as follows :—

Sometime in the month of March these 3 accused men trespassed into char Upendra and cut away paddy therefrom.

Char Upendra is a char which was thrown up in the Barisal River, and in accordance with the Alluvion Regulation, Government resumed it in 1920. After resumption the char was settled with Babu Jogendra Nath Sen a local zemindar and Managing Director of the Brick Field Co. Ltd. Jogendra Babu took settlement of the char for the year 1920-21 and after possessing it for that year, again renewed the settlement for 1922-23. Both these years he possessed the char in question. In 1924, one Sultan and one Lakhi Kanta Babu jointly took possession of this char from the Government. Sultan

*Criminal Revision No. 700 of 1925, against the order of H. W.C. Carter Esq., Sessions Judge of Bakarganj, dated the 6th August, 1925, affirming that of Mr. S. M. Murshed, Deputy Magistrate of Barisal, dated the 27th July, 1925.

let it out in *barga* and the *bargadars* grew paddy therein which was cut by these accused men.

This is in brief the case for the prosecution as it appears from the evidence on record. The accused men pleaded not guilty. The defence case is that accused Surendra Nath Ghosh has been possessing the char ever since it was thrown up and that he is legally entitled to its possession under the Alluvion Regulations, inasmuch as the char in question is an accretion to his estate which is contiguous to it and that the channel in between the char and the main land is fordable during the winter.

The defence therefore does not impugn the correctness of the prosecution case so far as the occurrence is concerned. The prosecution case is that the accused men trespassed into the char ; erected a hut on it and cut away paddy which was grown by the *bargadars* of Sultan who had taken settlement of the char in question from the Khash Mahal Department of the Government. The only question that needs to be considered in this case is one of possession. In this point I find that the prosecution have adduced unassailable evidence to show that from as early as 1920 the Government assumed actual possession of the char in question. Babu Jogendra Nath Sen gave evidence in this case. He is Court witness No. 1. He said that he possessed the char for 2 years up to 1923. He had been to the char in question. He got sands of the char sold and lastly he got the paddy which he found grown in it by some unknown men cut. He is a zemindar, a director of many companies and I don't disbelieve him. His evidence could therefore show that since 1921 Government have been possessing the char in an undisputed manner. Jogendra Babu said that in 1923 some unknown men grew paddy in the char but that he got this paddy cut without there being any protest from any body. This shows that some unknown men had trespassed into the land and had, on the sly, grown paddy there but when the paddy was cut, those men raised no objection. The conduct of those men therefore confirms the fact that the char in question was in the undisputed possession of the Government. The defence argued that it is the accused men who had grown the paddy. If that be so the accused men evidently committed trespass ; and the fact that they did not protest against the paddy being cut by Jogen Babu shows that the accused men knew of their trespass and hence kept quiet. There is no evidence in record to show that the accused men did anything by way of complaining against those who had cut the paddy away in 1923. In 1924 this char was settled with Sultan by the Government. Exhibit

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is the *kabuliat*. This shows that as a matter of fact Sultan did take settlement of char Upendra. Now as regards Sultan's actual possession there is the evidence of these *bargadars* (P. Ws. 3, 4 and 6) and also of other witnesses who said they had seen the *bargadars* cultivating the char. The defence have criticised the testimony of these witnesses. The defence say that the witnesses are not reliable. I don't see any reason for disbelieving them. I have no doubt that the char has been in the possession of the Government since its accretion, and that the accused men came upon the char in March last, erected a hut thereon and cut away paddy therefrom. The facts of the case have not been challenged by the defence whose case is that the accused have been possessing the char for a long time.

As regards the defence witnesses I am not inclined to believe them. D. W. I said that he had seen the hut in question for two years or so. This is falsified by the evidence of Jogendra Babu whom I cannot disbelieve.

Considering all the circumstances and facts of the case I am of opinion that the accused men are guilty of both the charges under sections 447 and 379 Indian Penal Code.

Babu Suresh Chandra Taluqdar for the Petitioner.

No one for the Crown.

The following judgment was delivered :

October, 15.

Under the provisions of section 421 Code of Criminal Procedure the appellate Court has the power to dismiss an appeal summarily on receiving the petition and perusing the same. But, in this case, the learned Judge sent for the record and, after the arrival of the record, it appears that he did not give the appellant an opportunity of being heard. We think that under section 421 Code of Criminal Procedure the appellant was entitled to be heard in support of his appeal. Under these circumstances, the order dismissing the appeal is set aside and the learned Judge is directed to give the appellant an opportunity of being heard in support of his appeal.

A. T. M.

• Case sent back.

Before Mr. Justice Sukrawardy, and Mr. Justice Duval.

BIRENDRA NATH CHATTERJI

v.

UMANANDA MUKERJI.*

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July, 17.

Certificate—Indian Penal Code (Act XLV of 1860) section 197,—Criminal Procedure Code (Act V of 1898) Section 253,—Post Office Savings Bank Act (V of 1873) and the rules relating thereto.

Per Curiam : The certificate given by the accused, who was entitled to the money on the death of the widow, the depositor, under the rule that in the case of female depositors withdrawing money from Post Office Savings Bank by their authorised agents under rule 18, the agent must sign a certificate on the application for withdrawal to the effect "certified that the depositor is on this day alive and sane", is not a certificate prescribed by Government Savings Bank Act or statutory rules made thereunder and this certificate is not a certificate within the meaning of section 197 I. P. C.

The statutory rules under the Government Savings Bank Act as to payment only apply in the case of payment of deposits to minors or guardians, of deposits belonging to lunatics or deposits by or on behalf of married woman but not to a widow.

Per Sukrawardy J. : The word "certificate" occurring in section 197 I. P. C. contemplates a certificate which is required by law to be given or signed for the purpose of being used in evidence in the course of administration of justice.

The prosecution should not proceed when it was found by the Courts below that the complainant had no interest in the money which was withdrawn by the accused, who was entitled to it as heir of the deceased.

Dubitante : Section 197 I. P. C. if applicable to certificates contemplated by note 2 to section 25 of the general rules and orders framed under Post Office Savings Bank Act.

Application for Revision by the Complainant.

Charge under sections 197, 420 and 404 Indian Penal Code.

The accused was discharged. The other facts appear from the judgment.

Mr. S. K. Sen (Counsel), Babus Hira Lal Ganguli and Harendra Nath Mukerji for the Petitioner.

Mr. B. C. Chatterji, Babus Debendra Narayan Bhattacharji, Probodh Chandra Chatterji, Satindra Nath Mukerji, Mritunjay Chatterji, Biraj Mohan Roy and Nirmal Chandra Chakravarty for the Opposite party,

The judgments of the Court were as follows :

*Criminal Revision No. 318 of 1925, against the order of the District Magistrate of Berhampur, dated the 24th March, 1925, affirming that of Mr. J. M. Chowdhury, Deputy Magistrate of Berhampur, dated the 26th February, 1925.

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July, 17.

Duval, J :—In this case a Rule has been obtained against an order of discharge of one Umananda Mukherjee who was placed on his trial under sections 197, 420, and 404 Indian Penal Code. The charge against him was that he knowing of the death of one Bhaba Sundari Debi who died on the 3rd January 1923 as her agent in respect of her savings Bank account at Berhampore withdrew on the 5th and 9th January 1923 in all Rs. 1550 by signing two certificates to the effect that she was alive on those days. The Deputy Magistrate discharged the accused holding that sections 420 and 404 did not apply because as a matter of fact the accused was entitled to the money on the lady's death and section 197 did not apply on the ground that the certificates given that the lady was alive and sane, were not such certificates as were contemplated by section 197 Indian Penal Code.

After the discharge by the Deputy Magistrate the case came up before the District Magistrate who agreed with the Deputy Magistrate and refused to order a further enquiry.

Now, the point for decision to my mind appears to be whether these certificates which undoubtedly the accused gave on the 5th and 9th January 1923, that the depositor Bhaba Sundari was alive and sane when she was already dead are certificates which came within section 197. Under the Government Savings Bank Act (Act V of 1873) under which the Post Office Savings Bank is conducted the Governor-General in Council may make certain statutory rules. But these rules as to payment only apply in the case of payment of deposits to minors or guardians, in the case of payment of deposits belonging to lunatics and in the case of payment of deposits by or on behalf of married women. Bhaba Sundari comes under none of these three classes. She was a widow and the accused was her brother by adoption. The certificate given under the rule that in the case of female depositors withdrawing by their authorised agents under rule 18 the agent must sign a certificate on the application for withdrawal to the effect 'certified that the depositor is on this day alive and sane' does not appear to be a certificate either prescribed by the Government Savings Bank Act or by statutory rules made thereunder. The rule appears to be made for the general conduct of the Post Office business. Therefore it appears to me that the certificates given by Umananda cannot be certificates such as are covered by section 197 Indian Penal Code. The question whether they can come under any other section of the Code which requires sanction under section 195, Criminal Procedure Code is not at present before us. This is purely a private

prosecution and not on the complaint of any of the officers of the Post Office.

In this view I agree with the finding of the Deputy Magistrate and the District Magistrate that section 197 does not apply. Therefore this Rule must in my opinion be discharged.

Suhrawardy, J.:—I agree with the interpretation put by my learned brother on the rule or rather the note to the rule framed under the Post Office Savings Bank Act. I should, however, like to base my opinion on the general policy which should guide us in interfering with the order of the trial Court when discharging an accused under section 253 Criminal Procedure Code. This is a private prosecution by a person who has been found by both the Courts below to have no interest in the money which was withdrawn by the accused. It has been found that the accused was the person who was entitled to this money. He is the heir to the deceased and the money would have come to him as heir. In the circumstances it is not desirable that this prosecution should proceed.

With regard to section 197 I have great doubt if it applies to certificates contemplated by note 2 to section 25 of general rules and orders framed under Post Office Savings Bank Act (Act V of 1873). That note says "In the case of withdrawals made from the account of female depositors by their authorised agents under rule 18 the agent must sign the following certificate on the application for withdrawal 'Certified that the depositor is on this day alive and sane'. My learned brother has pointed out that this rule is not one of the rules which the Governor-General in Council is authorised to make under section 14 of Act V of 1873. But assuming that such a rule was framed under legal authority I am afraid that section 197 is not applicable to a certificate granted under such rule. The use of the word 'Certificate' in the rule has no doubt led to this confusion. In the note the word "Certificate" might have been replaced by the word "declaration" or "statement". The certificate contemplated by section 197 to my mind as at present advised is a certificate which is required by law to be given or signed for the purpose of being used in evidence in the course of administration of justice. That section is one of the sections in the Chapter headed "Of False Evidence and Offences against Public Justice". Section 198 which follows it makes its meaning clear. Section 198 runs thus "Whoever corruptly uses or attempts to use any such certificate (namely certificate contemplated by section 197) as a true certificate knowing the same to be false in

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any material point shall be punished in the same manner as if he gave false evidence". This section indicates that the offence of issuing or signing a false certificate is one which is intimately connected with the administration of justice. The only thing which goes against the view is that it is not a section which requires any special sanction of a Court of justice or of a public officer for the initiation of the proceedings. It is, however, unnecessary to go into greater details in this matter as I think that on the other grounds this Rule ought to be discharged.

A. C. R.

Rule discharged.

APPELLATE CIVIL

Before Sir Babington Bennett Newbould, Knight, Judge and
Mr. Justice Graham.

ISWAR SANT AND OTHERS

v.

TORENDRA NATH KUILA*

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June, 5.

Ejectment—Under-raiyat—Heritability—Occupancy right—Local custom—Res-judicata.

Where in a suit *inter partes* in ejectment it was held that the defendants had no right of occupancy, but the suit was dismissed on the ground of its being instituted before the agricultural year in which the defendants' predecessor died and on appeal the decree of dismissal was affirmed on the second ground, the appellate Court coming to no decision on the question, whether the defendants had a right of occupancy, held that it was not *res-judicata* in a subsequent suit for ejectment: *Sheosagar Singh v. Sitaram Singh* (1) followed.

Under ordinary circumstances, the right of an under-raiyat is not heritable.

An under-raiyat may acquire right of occupancy by custom or usage and is not then liable to be ejected under section 49 of the Bengal Tenancy Act: *Gopal Mondal v. Tapai Sankhari* (2) referred to.

* Appeal from Appellate Decree No. 2213 of 1922, against the decree, of Babu Bamandas Mukherje, Subordinate Judge, 2nd Court of Midnapore, dated the 12th May 1922, modifying the decree of Babu Soroj Kanta Banerjee, Munsiff, 3rd Court, at Tamluk, dated 25th February, 1921.

(1) (1897) L. R. 24 I. A. 50; I. L. R. 24 Calc. 616.

(2) (1918) I. L. R. 46 Calc. 43.

The descendant of an under-raiyat, who acquired right of occupancy, if he fails to prove heritability under a local custom, is a trespasser on the land and is liable to be ejected without notice.

Appeal by the Defendant.

Suit for ejectment.

The material facts appear from the judgment.

• *Babu Apurba Charan Mukerjee* for the Appellants.

• *Mr. Mahendra Nath Ray* and *Babu Santosh Kumar Pal* for the Respondent.

• The judgment of the Court was as follows :

This is an appeal against a decree in ejectment. The predecessor of the defendants was an under-raiyat under the plaintiff.

The main question in this appeal is whether that under-raiyati tenancy descended to the defendants by inheritance. The first Court held that the defendants' predecessor was an under-raiyat with right of occupancy and that the defendants had succeeded to that right. The lower appellate Court has held that the defendants had no right of occupancy and were mere trespassers on the land and that the plaintiff was therefore entitled to a decree for khas possession of the same. We think that the learned Subordinate Judge who decided the case in the lower appellate Court was in error so far as he held that the question whether the defendants had a right of occupancy in the disputed land was *res judicata*. In a previous suit in ejectment which was *inter partes* the Munsiff who tried the suit held that the defendants had no right of occupancy but he dismissed the suit on the ground of its being instituted before the expiry of the agricultural year in which the defendants' predecessor died. On appeal that decree of dismissal was affirmed on the second ground and the lower appellate Court came to no decision on the question whether the defendants had a right of occupancy. The decision of the Judicial Committee of the Privy Council in *Sheosagar Singh v. Sitaram Singh* (1) is a clear authority for holding that the decision of the first Court in a former suit did not operate as *res judicata* in the present suit. But though the lower appellate Court was wrong on this point and though its judgment is not well expressed there is a finding apart from that of *res judicata* which is sufficient to support its decision. It was held that the defendants have failed to prove that the under-raiyati interest of

(1) (1897) L. R. 24 I. A. 50 ; I. L. R. 24 Calc. 616.

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the defendants' predecessor was heritable under some local custom and that even supposing that their predecessor had a right of occupancy therein this is of no benefit to them unless they can prove local custom of heritability. It is contended on behalf of the appellants that this decision is wrong and that if the defendants' predecessor had an occupancy right their right was necessarily heritable. It is now settled law that under ordinary circumstances the right of an under-raiyat is not heritable. No authority has been shown to us in support of the contention that the interest of an under-raiyat with a right of occupancy is heritable.

It is contended that unless an under-raiyat with a right of occupancy has the same benefits which the law gives to a raiyat with occupancy rights he will gain no benefit from such a right. But there is one section in the Bengal Tenancy Act which makes a provision for the benefit of an under-raiyat having an occupancy right and that is section 183. Further it has been held by a Division Bench of this Court in the case of *Gopal Mondal v. Tapai Sankhari* (1) that an under-raiyat may acquire right of occupancy by custom or usage and is not then liable to be ejected under section 49 of the Bengal Tenancy Act. We are unable to accept the contention that from this decision it follows that when an under-raiyat has a right of occupancy section 26 of the Bengal Tenancy Act is applicable. Section 26 is by its term limited to the case of raiyat in respect of his right of occupancy and cannot be held applicable to the case of an under-raiyat who, as already stated has not, as such, a transferable right in his holding. In the case of a raiyat his holding is heritable whether he is an occupancy raiyat or a non-occupancy raiyat. In the case of an under-raiyat who has no right of occupancy his holding is certainly not heritable and we can find nothing either in the statutory law or in the case law which would make an exception in the case of an under-raiyat with right of occupancy. We therefore, hold that the decision of the Subordinate Judge is right on the ground that the defendants having failed to prove that their predecessor's interest was heritable under a local custom were trespassers on the land and were liable to be ejected without notice. It is contended that the lower appellate Court should have decided the issue which was raised in the first Court whether the defendants had been recognised as tenants after their predecessor's death. That issue was decided against the defendants by the Court of first instance. It does not appear that in the

(1)(1918) I. L. R. 46 Calc. 43.

lower appellate Court a contention raised on the respondent's behalf that this portion of the first Court's judgment was wrong. It was, therefore, unnecessary for the lower appellate Court to record a finding on that issue.

We accordingly, dismiss this appeal with costs.

A. C. R.

Appeal dismissed.

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PRIVY COUNCIL.

PRESENT.—*Lord Shaw, Lord Carson, Lord Blanesburgh,
Sir John Edge, and Mr. Ameer Ali.*

VAITHIALINGA MUDALIAR & OTHERS

v.

SRIRANGATH ANNI & OTHERS.

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February, 10, 12,
13, 16, 17.
April, 2.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS].

Hindu Law—Widow's interest in husband's estate—Position of reversionary heirs to the estate—Adverse possession against widow—Judgment after trial in suits by or against widow—Possessory suits involving issue of validity of adoption—Limitation Act (IX of 1871), Schd. II Art. 129—Limitation Act, (XV of 1877), Schd. II Art. 141.

A Hindu widow has not power to make a gift of her husband's estate. Handing over the possession of the estate to a son to whom she has validly adopted to her deceased husband is not making a gift of the estate to him. The estate became his on his adoption if he was validly adopted. She has no power to sell or assign the estate except for necessity, so as to bind her husband's reversioners after her death.

A Hindu widow is entitled to the beneficial use and enjoyment of her husband's estate during her life. She also represents the estate in suits brought by or against her for possession of that estate or any part of it, and she and the reversionary heirs of the estate are bound by any final decree of Court, duly and properly obtained, after fair trial, and free from any collusion or fraud: *N. C. Chukerbutty v. I. C. Chukerbutty* (1); *K. Natchier v. Raja of Siva gunga* (2); *Aumirtolal v. R. Mitter* (3); *Juggl Kishore v. F. M. Tagore* (4);

(1) (1868) 9 W. R. 505; B. L. R. Sup. Vol. 1008.

(2) (1863) 9 M. L. A. 539; 2 W. R. P. C. 31.

(3) (1875) L. R. 29 I. A. 113; 15 B. L. R. 101, 23 W. R. 214.

(4) (1884) L. R. 11 I. A. 66; I. L. R. 10 Calc. 985.

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Partab N. Singh v. Trilokinath Singh (1); *Hurrinath Chatterji v. M. M. Goswami* (2); *Chaudhari R. Singh v. Bulwant Singh* (3); followed. *Runchordass v. Parvatibhai* (4), distinguished.

A suit brought to establish any rights, but involving necessarily the determination of the validity or invalidity of an adoption as the basis of such rights, fell under article 129 of schedule II of the Limitation Act, IX of 1871: *Jagadamba v. Dakhina* (5), followed.

Nine consolidated appeals from a decree dated 15th November, 1916 of the High Court, modifying a decree dated the 4th September, 1908 of the Subordinate Judge of Nagapatam.

The main facts and arguments appear from the judgment of their Lordships.

Sir G. Lowndes K. C., W. Wallack and *M. R. Billai* for the Appellants.

J. M. Parekh for Srirangath Anni & others.

L. De. Gruyther. K. C. and *K. V. L. Narasimham* for Somasundaram Chettiar and A. Rangasami Chettiar.

C. A. V.

April, 2.

The judgment of the Board was delivered by

Sir John Edge: These are nine consolidated appeals from a decree, dated the 15th November, 1916, of the High Court at Madras, which varied a decree, dated the 4th September, 1908, of the Subordinate Judge of Nagapatam.

The suit in which these appeals have arisen was brought in the Court of the Subordinate Judge on the 2nd July, 1905, by three plaintiffs, who were reversioners of Arunachala Mudaliar, against thirty-eight defendants for the possession of lands which were alleged by the plaintiffs to be lands of the Kulikara estate in the District of Tanjore and for mesne profits. The title of the plaintiffs to sue was denied by the defendants on various grounds, of which those which are now important and have to be considered are whether the suit was not barred by the result of a litigation which began in 1887 and ended with a final decree in 1892, and whether the suit was not otherwise barred by the law of limitation.

The Kulikara estate admittedly belonged to Arunachala when he died in 1849. He was then about twenty-two years of age. The family to which he belonged were Hindus of the Sudra caste.

(1) (1884) L. R. 11 I. A. 197; I. L. R. 11 Calc. 186.

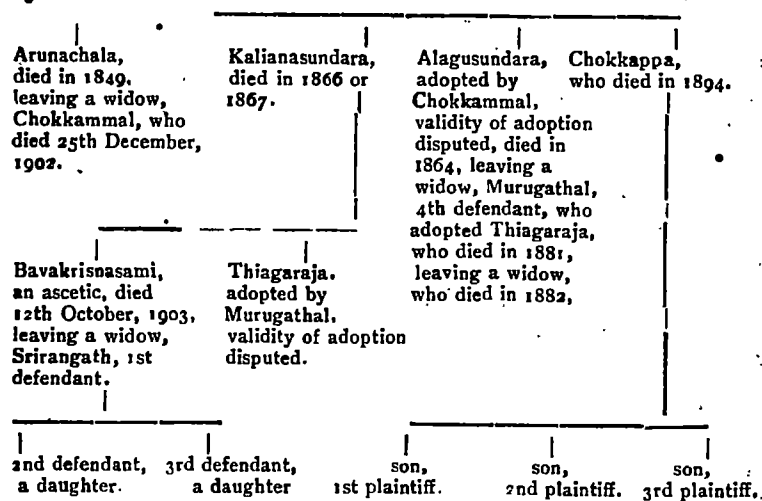
(2) (1893) L. R. 20 I. A. 183; I. L. R. 21 Calc. 8.

(3) (1918) L. R. 45 I. A. 168; 28 C. L. J. 519.

(4) (1899) L. R. 26 I. A. 71; I. L. R. 23 Bom. 725.

(5) (1886) L. R. 13 I. A. 84; I. L. R. 13 Calc. 308.

He had been adopted by Vithialinga Mudaliar, a relation, who was descended from an ancestor from whom Arunachala also was descended. The plaintiffs are the three sons of Chokkappa Mudaliar, who was the youngest of three brothers by birth, that is, natural brothers, of Arunachala. Arunachala died childless, leaving a widow, Chokkam-mal, who died on the 25th December, 1902, within twelve years before this suit was instituted. She was a defendant to the suit with which the litigation of 1887 commenced. It will be necessary to refer at some length to that litigation. The following pedigree will show Arunachala and his natural brothers and some other persons :—



Arunachala, as whose reversioners the plaintiffs claim to be, had before his death directed his wife Chokkam-mal to adopt as a son to him his natural brother Alagusundara. In 1862 Chokkam-mal did as a fact adopt Alagusundara as a son to her late husband. Alagusundara was a younger natural brother of Arunachala, and at the time of the adoption there was no one living who could give him in adoption. As a matter of Hindu law the adoption was invalid.

In 1862 Chokkam-mal, having adopted Alagusundara, put him in possession of the immovable property now in question, reserving to herself for her maintenance some of the immovable property to which she was entitled as the widow of Arunachala. With the property which she reserved for her maintenance this suit is not concerned. There can be no doubt that in 1862 Chokkam-mal did put Alagusundara in possession of the property now in question. In March, 1862, she presented an undated petition to the Tahsildar of

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Nannilam, the Revenue Officer, in which she stated that, with the consent of her husband, she had adopted Alagusundara, his natural younger brother, and, with the exception of certain villages which she named, she had made him proprietor of all the land and other properties, etc., standing in her name, and prayed that, with the exception of three villages, "the miras" (ownership) might be transferred to him and all the sircar proceedings might be passed in his name.

Alagusundara continued to be in possession of the property of which Chokkammal had put him in possession in 1862 until he died in 1864, and had dealt with the property which had been transferred to him as an absolute owner would have done. Upon his death in 1864 his elder brother Kaliasundara, on the 18th July, 1864, presented a deed of consent to the Tahsildar of Nannilam praying for the transfer to the name of Thiagaraja of the property which stood in the name of Alagusundara, and the miras was transferred to him. Thiagaraja was by birth a son of Kaliasundara and had been adopted by Alagusundara. He was in 1864 about two years of age.

From the 18th July, 1864, Kaliasundara, until he died in September, 1876, was referred to in all documents relating to the property as the guardian of Thiagaraja, who was in possession of the property in question from 1864 until he died in 1881, and during that time the management of the affairs of the family was carried on solely in his name. Upon the death of Thiagaraja in 1881 the miras which had stood in his name was altered to the name of his widow Kamalath, a girl of about 12 years of age, who died in 1882. Upon the death of Kamalath in 1882, Murugathal, the mother by adoption of Thiagaraja, took possession of the property in question for a Hindu widow's interest and held it until 1884, when Chokkammal forcibly ejected her.

On the 9th February, 1887, Murugathal brought a suit in the Court of the Subordinate Judge of Nagapatam against Chokkammal and others, in which she claimed a decree for the possession of the properties now in question, alleging in her plaint that her husband Alagusundara had been the adopted son of Arunachala, and that the properties which she claimed belonged to him as such adopted son, and had been enjoyed by him from 1862 until he died in 1864; that after his death her adopted son Thiagaraja had enjoyed them until he died in 1881, and after him his widow, Kamalath, got them according to Hindu law and she died childless in 1882, and since her death she, Murugathal, got them under

Hindu law and enjoyed them until 1884, when Chokkammal forcibly took possession of them and enjoyed them adversely to her. Chokkammal in her written statement in that suit denied Murugathal's title, alleged that she, Chokkammal, had been in possession of the property in question for 38 years from the death of her husband Arunachala in 1849, and denied that Alagusundara had been adopted. Several issues were framed by the Subordinate Judge in that suit, who found that Alagusundara was adopted as a son to Arunachala in 1862 by Chokkammal, who had the authority of her husband to make the adoption, that the adoption was invalid according to Hindu law, that Thiagaraja was adopted by Murugathal under the authority of her husband, but that the course of conduct of Chokkammal and the change of position of Alagusundara as the result of his adoption made it inequitable to hold that he had not title to the property, and that the putting him in possession of the property in question and allowing him to manage it for his own purposes substantially operated as a gift of the property to him. The Subordinate Judge in that suit also held that Murugathal's claim of adverse possession of the miras for twelve years was established, and on the 18th December 1889, he gave her a decree for possession of the property which she claimed. From that decree of the Subordinate Judge the suit of 1887 went on appeal by Chokkammal to the High Court at Madras. The learned Judges of the High Court held that Alagusundara's adoption was invalid, but holding that Murugathal's claim of adverse possession for twelve years was established, by their decree of the 17th August, 1892, dismissed Chokkammal's appeal. Chokkammal did not appeal from that decree of the High Court, and it became final.

It is necessary to consider what was Chokkammal's position as a Hindu widow and how far her acts could, according to Hindu law, bind the reversioners to her husband. On Arunachala's death in 1849 she became entitled to the full beneficial enjoyment of the estate which had been his at the time of his death. As Mr. Mayne, in paragraph 605 of his "Hindu Law and Usage," correctly, in their Lordships' opinion, said :—

"It was at one time common to speak of a widow's estate as being one for life. But this is wholly incorrect. It would be just as untrue to speak of the estate of a father under the Mitakshara law as being one for life. Hindu law knows nothing of estates for life, or in tail, or in fee. It measures estates, not by duration, but by use. The restrictions upon the use of an estate inherited by a

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woman are similar in kind to those which limit the powers of a male holder, but different in degree."

The Hindu widow has not power to make a gift of the estate. Handing over the possession of the estate to a son whom she has validly adopted to her deceased husband is not making a gift of the estate to him. The estate became his on his adoption if he was validly adopted. She has no power to sell or assign the estate except for necessity, so as to bind her husband's reversioners after her death. But she represents the estate in suits brought by her or against her for possession of the estate or any part of it, and she and the reversioners are equally bound by any final decree which a Court makes in such a suit provided that the suit was fought out according to law and was not collusive or fraudulent.

In the suit (of ?) 1887 Chokkammal was no doubt personally interested to defeat Murugathal's claim for the possession of lands which had been in her own possession as the widow of Arunachala from 1849 until 1862, but although her object in resisting Murugathal's claim was probably a purely personal and selfish object, she did, in fact and in law in that suit, represent the estate as well as her own interests as a Hindu widow. The suit of 1887 was not a collusive suit; it was regularly and according to due procedure at law fought out in the Court of the Subordinate Judge and in the High Court.

A protracted argument was submitted to the Board on the question whether under Hindu law adverse possession against a widow in possession of an estate for a Hindu widow's interest bars the reversioner. While it is not necessary in the view which will later be announced by the Board on the question of limitation in this case to make any formal pronouncement upon this point, it may be convenient to say that the authorities referred to were as follows:—In *Goluckmonnee Dabee v. Degumber Dey*, which was decided in 1852, Sir Lawrence Peel, who was the Chief Justice of the Supreme Court at Calcutta, said:—"It has been invariably considered for many years that the widow" (speaking of the widow as heir) "fully represents the estate, and it is also settled law that adverse possession which bars her bars the heir after her, which would not be the case if she were a mere tenant for life, as known to the English law." (See the reference to that case in the judgment of Sir Barnes Peacock, C. J., in 9 W. R. Civil Ruling at page 507).

In *Katama Natchier v. The Rajah of Shivagunga*, (1) which was decided by the Board in 1863, the Board, consisting of 3 Knight

(1) (1863) 9 M. I. A. 539.

Bruce, L. J., Sir Edward Ryan, and Turner L. J., the assessors being Sir Lawrence Peel and Sir James W. Colville, all being eminent lawyers, and three of them having had judicial experience in India, Lord Justice Turner delivered the considered judgment of the Board, and in it said, at page 603, as follows:—

"It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in *Anga Mootoo Natchier's* lifetime, would have bound those claiming the *Zemindary* in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the *Zillah* Court by any person claiming in succession to *Anga Mootoo Natchier*. For, assuming her to be entitled to the *Zemindary* at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to the case of a Hindoo widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

The declaration as to Hindu law which their Lordships have quoted from the considered judgment of the Board, which was delivered by Lord Justice Turner in 1863, has in the present appeal been objected to on the ground that it was *obiter*. The following cases however were referred to as showing that the doctrine there set forth was in accord with the course of judicial decisions.

Their Lordships will first refer to the case *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty*, (1) which came before a Full Bench of the Calcutta High Court, 1867, in which the declaration of the Board in the *Shivagunga* case (2) to which their Lordships have referred was accepted as a correct statement of the Hindu law to which it related and was applied to the case before the Full Bench. The facts of the case before the Full Bench are not fully stated in the order of reference to the Full Bench, but they were as follows: One Ramdoollub Chuckerbutty died possessed of an estate consisting of lands leaving two sons, two daughters and his

(1) (1868) 9 W. R. 505.

(2) (1863) 9 M. I. A. 539.

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widow, Dhone Mala. The two sons died without issue in the lifetime of the widow, and upon their death the widow, Dhone Mala, became entitled to the possession of the respective estates of the sons, but the defendant in that suit, a stranger, and as a trespasser, took possession of the estate more than twelve years before the suit, and the widow never obtained possession. Upon the death of the widow, sons of the daughters, who were the reversioners to their uncle's estate, brought the suit for possession, which was before the Full Bench in second appeal. The first appellate Court had dismissed the suit as not brought within time, that is, within twelve years from the time when the defendant had wrongfully taken possession, and the question before the Full Bench was whether the suit was barred by limitation or whether the reversioners could sue upon the death of the widow, Dhone Mala. The Full Bench held that the cause of action arose when the defendant had taken possession and that the suit was time barred. The Full Bench was an exceptionally strong Bench of Judges, who had much experience in cases involving considerations of Hindu law. Their Lordships will give extracts from the judgments which were delivered in the Full Bench, as those judgments appear to their Lordships to confirm the declaration as to Hindu law which they have quoted from the judgment of the Board in the *Shivagunga* case (1) and to have a direct bearing on the appeal before the Board, and are very instructive.

In delivering his judgment in that Full Bench case, with which Seton-Karr, J., concurred, Sir Barnes Peacock, C. J., after referring to Sir Lawrence Peel's judgment already mentioned, said :

"It was also held by the Privy Council in the *Shivagunga* case (1) that in the absence of fraud or collusion a decision against a widow, with regard to her deceased husband's estate, would be binding upon the reversionary heirs... If the female heir in the present case had sued the wrong doer, and without fraud or collusion had failed to make out her case to turn him out of possession, the reversionary heirs would have been bound by the decision. I am assuming that they are not claiming through the female heir."

Farther on Sir Barnes Peacock said :

"It is said that the reversionary heirs could not sue (for possession) during the lifetime of the widow, and that therefore they ought not to be barred by any adverse holding against the widow at a time when they could not sue. But when we look at the widow as a representative, and see that the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against

(1) (1863) 9 M. T. A. 539.

her without fraud or collusion, we are of opinion that they are also bound by limitation, by which she, without fraud or collusion, is barred."

Jackson, J., in his judgment, said :

"I entirely concur in the opinion of the Chief Justice that the plaintiff (the reversionary heir) was barred in the present case....It has been distinctly held by the Privy Council in the *Shivagunga* case (1), that a decision fairly arrived at without fraud or collusion in the presence of a Hindu widow in possession of the estate will bind reversionary heirs. That being so decided, it appears to me impossible to escape the conclusion that an adverse possession which barred the widow will also bar the heirs, and in that opinion we are fully and strongly supported by the decisions of the late Supreme Court in the cases to which his Lordship the Chief Justice has referred."

Phear, J., in his judgment, said :

"I too desire to avoid pledging myself to all the illustrations which have fallen from the Chief Justice ; but with this exception, I concur entirely in the reasoning which he has given in support of his conclusions, and I concur also in the remarks which have been made by Mr. Justice Jackson. I will add that it seems to me that when a reversionary (Hindu) heir succeeds to the property of his ancestor on the death of an intervening female heir, he takes substantially the same proprietary right as she enjoyed, and no more, though doubtless she was fettered in a way that he is not, with regard to the dealings with the property, viz., her alienations are often liable to be avoided by him when he succeeds to the right of succession."

Macpherson, J., in his judgment, said :

"I also concur in the proposed answer. But a very great difference exists between the case immediately before us and the case in which a mother or other Hindu female having an estate similar to that of a childless widow has herself alienated property belonging to the estate which she has taken as heiress, without sufficient reason for making such alienation. In the latter case, the alienation is good as against her, and so far as her own life interest is concerned. Therefore, in fact, no cause of action necessarily arises at all with respect to her alienation so long as she lives. The cause of action does not arise until her death, when the reversioner's cause of action for the first time accrues. In the case before us, the property having never reached the hands of the mother (the Hindu widow)

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at all, having been throughout held adversely to her, the cause of action (of the reversioner) accrued in the mother's lifetime, and therefore a suit to recover possession, by whomsoever it may be brought, is barred unless instituted within twelve years from the commencement of the adverse possession".

In *Aumirtolall Bose v. Rajoneekant Mitter* (1), in 1875, the decision of the Full Bench at Calcutta in *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty* (2), was cited in argument, and Sir Barnes Peacock, in delivering the judgment of the Board, affirmed that decision.

In *Jugol Kishore v. Maharajah Jotindra Mohun Tagore*, (3) which was before the Board in 1884, where a Hindu widow's right, title and interest in property had been sold in execution of a money decree, the Board, without a suggestion of dissent from the ruling, said, at page 73, "It was held in the *Shivagunga* case (4), that although a widow has for some purposes only a partial interest, she has for other purposes the whole estate vested in her; and that in a suit against a widow in respect of the estate the decision is binding upon the reversionary heir." The Board also said:

"If the suit is simply for a personal claim against the widow, then merely the widow's qualified interest is sold (in execution of the decree) and the reversionary interest is not bound by it (the sale). If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes."

In *Partab Narain Singh v. Trilokinath Singh*, (5) which was before the Board in 1884, the Board said, at page 207:

"It is sufficient for the present purpose to hold that, until she had appointed another to be owner and representative, the Maharanee's estate in the taluk was sufficient to constitute her the full representative of it in the former suit. Her estate was at least as large as that of a Hindu widow in her husband's property. What was said by this Board of the widow's estate in the *Shivagunga* case (4), is applicable to hers."

In *Hurrinath Chatterji v. Mohunt Mothoor Mohun Goswami*, (6) which came before the Board in 1893, it was held that the rule in the *Shivagunga* case (4), to the effect that an adverse decree against a Hindu widow binds those claiming in succession applies equally to the case of the daughter. It had been argued in that case that the adverse title alleged was founded on something which was

(1) (1875) L. R. 2 I. A. 113.

(3) (1884) L. R. 11 I. A. 66.

(5) (1884) L. R. 11 I. A. 197.

(2) (1868) 9 W. R. 505.

(4) (1863) 9 M. I. A. 539.

(6) (1893) L. R. 20 I. A. 183.

independent of limitation, and that the Limitation Act XV of 1877 let the reversionary heir sue within twelve years from the time when his right to possession accrued. With reference to that argument, Lord Watson, at page 188, said :—

“But you must show that the new law gives a right of action to a reversioner notwithstanding that the widow's right of possession had been extinguished by decree.”

•Owing to the fact that it did not appear from the judgment of the Board when Pearimoni, who was the second wife of Ramamundun Goswami, had died, beyond the fact that she was living when he died in 1847, there was some hesitation in referring to that case in the argument of this appeal, Mr. De Gruyther has, however, shown from the Appeal Record of that case, which is preserved in the Privy Council Office, that Pearimoni died in 1855.

In *Chaudhari Risal Singh v. Bulwant Singh* (1) which was before the Board in 1915, Chaudhari Risal Singh, alleging that he was the reversionary heir of Jagat Prakash Singh, brought a suit against Bulwant Singh for possession of immovable property known as the Landhaura estate. The property there claimed had belonged to Raja Raghubir Singh until he died childless in 1868. Raghubir Singh left a widow, Rani Dharam Kunwar, who bore to him a posthumous son, Jagat Prakash Singh, who died in 1870. Rani Dharam Kunwar had the authority of her husband to make successive adoptions. In 1877 she adopted to her husband a boy who died within three years after he had been adopted, and then she adopted another boy, who died in 1885, and in 1890 she adopted Bulwant Singh, the defendant to the suit. She continued in possession of the property, alleging that her husband Raghubir Singh had by his will left it to her for her life. After a time Rani Dharam Kunwar and Bulwant Singh quarrelled. She was claiming a right to manage the property during her life; he was claiming his full rights as an adopted son. The result was that, on the 7th January, 1905, Rani Dharam Kunwar brought a suit in the Court of the Subordinate Judge of Saharanpur against Bulwant Singh, in which she claimed to have it declared that she had no power to adopt Bulwant Singh and had never validly adopted him, and to have her registered deed of adoption, in accordance with which she had adopted him, declared void and ineffectual against her. He alleged that Rani Dharam Kunwar had power to adopt him, and had validly adopted him. The Subordinate Judge, holding that Rani Dharam Kunwar was estopped from denying that she had validly adopted Bulwant Singh,

(1) (1918) L. R. 45 I. A. 168.

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dismissed her suit. She appealed to the High Court at Allahabad, and the High Court, also holding that Rani Dharam Kunwar was estopped, dismissed her appeal. Thereupon she appealed to his Majesty in Council. The Board in that appeal considered the evidence in that suit, and having come to the conclusion that Rani Dharam Kunwar had validly adopted Bulwant Singh and that her appeal should be dismissed, advised His Majesty accordingly. In the judgment the Board, at page 178, said :

" There can be no doubt in their Lordships' opinion that Rani Dharam Kunwar in her suit against Bulwant Singh did, notwithstanding the personal estoppel under which she laboured, represent the estate on the question of fact as to whether Bulwant Singh had or had not been validly adopted, and that she represented the estate within the meaning of the rule in *Katama Natchier v. Raja of Shivaganga* (1). The principle of law to be applied in such cases was, their Lordships consider, correctly summarized by Banerji, J., in his judgment in this case, thus : 'Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir.' It cannot be said that there had not been a fair trial by the Board in 1912 of the right in the suit of Rani Dharam Kunwar against Bulwant Singh. The right in that suit was his right to the estate as a son validly adopted to Raja Raghubir Singh."

Upon the other side it was asserted the principle of the *Shivagunga* case (1) might have been applied and had not been applied in the case of *Runchordas Vandrawandas v. Parvatibhai* (2) which came before the Board in 1899. The suit in that case was brought on the 21st December, 1888, against Vandravandar and the Advocate-General of Bombay by Cursonadas Govindjee as the heir-at-law of Kallianji Sewji, who had died on the 6th January, 1869, leaving two widows—Cooverbai, who died in 1871, and Nenavahoo who died in 1888. Kallianji Sewji had made a will, which was proved on the 2nd March, 1869, by three executors, who were trustees, of whom the first defendant to the suit was at the date of the suit the sole survivor. The three trustees were appointed by the testator as trustees for dharam—that is, to make gifts for charitable or religious purposes. The will contained the following clause: "As to the estates which have been given by me to my wives, they are to enjoy the rent of the said estates during their natural lives, and on the death of my wives the said estates are to revert to my dharam, and whatsoever income may be derivable from the said estates is to

(1) (1863) 9 M. I. A. 539. (2) (1899) L. R. 26 I. A. 71.

be expended for my 'dharam." The main question in the suit was whether the gift for charitable or religious purposes was void for vagueness and uncertainty, and the High Court at Bombay and the Board in appeal held that it was void and that the trustees took no interest under the will. The suit was brought after the death of Nenavahoo.

It appears to their Lordships that part of the property claimed by the reversioner had been property of the respective widows as their stridhan, as to which there was some question as to the "rights of the heir" and that other parts of the property claimed was property which had been in the possession of the widows, to which the reversionary heir, the plaintiff in the ordinary course, was clearly entitled, and that the Board was considering how an account, which the Courts below had ordered to be prepared, should be worded so as to show those two classes of property.

The defence of limitation was raised, but the Board held that it did not apply, saying :

"It is not necessary to consider what might be the case if the widows or the survivor of them were suing, as the plaintiff does not derive his right from or through them, and the extinguishment of their right would not extinguish his."

It has been maintained that the Board was not intending to discredit the rule in the *Shivagunga* case (1). What the Board was considering was the wording of an account which the appellate Court and the first Court had ordered to be prepared. The judgment of the Board was delivered by Sir Richard Couch in 1899, who in 1893 had delivered the judgment of the Board in *Hurrinath Chatterji v. Mohunt Mohu Goswami*(2), which expressly approved of and applied as sound Hindu law the rule in the *Shivagunga* case (1). What was said by the Board in 1899 at the conclusion of the judgment makes it plain what the Board was considering. It is there said :

"The decree of the first Court, dated the 27th July, 1896 should not have been varied as it has been. It is for an account of the moveable property left by Cooverbai and Nenavahoo at the time of their deaths distinguishing between such of it as was their stridhan and 'as such' formed part of the estate of the testator. 'As such' appears to be an error for 'such as.' With this alteration their Lordships think the decree will be right."

As altered by the Board the account which was to be taken was an account of the moveable property left by Cooverbai and Nenavahoo, the widows of the said testator respectively at the time

(1) (1863) 9 M. L. A. 539.

(2) (1893) L. R. 20 L. A. 183.

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of their deaths distinguishing between such of the said property as was the stridhan of the said Cooverbai and Nenavahoo and such as formed part of the estate of the said testator.

It does not appear to their Lordships how the rule in the *Shivagunga* case (1) could have been applied in the case then before the Board. What the Board, at the stage of the suit which was then before the Board, the Board having decided against the trust to the trustees, was considering was what was the account which was to be taken, and the Board directed that the account should separately show what had been the stridhan of the widows, and what was the property to which the heir might ordinarily be entitled. Their Lordships are unable to see what was the estate, within the meaning of the *Shivagunga* case (1), which the widows had represented, or to what the rule in the *Shivagunga* case (1) could have been applied. The title of the trustees to the property devised or bequeathed to them for charitable or religious purposes by Kallianji Sewji was not questioned until the survivor of the two widows died in 1888, and that property had never been represented by the widows or either of them. It had been in the exclusive possession of the trustees under the will of Kallianji Sewji from 1869 until the Court in the suit which was brought on the 21st December, 1888, after the death of the last surviving widow, had decided that the gift for charitable or religious purposes was void.

The result of the cases to which their Lordships have referred shows, in their opinion, that the Board has invariably applied the rules of the *Shivagunga* case (1) as sound Hindu law where that rule was applicable.

It also appears to their Lordships that the suit is barred by limitation. The plaintiffs could not be entitled to a decree for possession without displacing the adoption of 1862 of Alagusundara by Chokkammal. It was held by the Board in *Jagadamba Chowdhraji v. Dakhina Mohun* (2), that Article 129 of the second schedule of Act IX of 1871 relates to all suits in which the plaintiff cannot succeed without displacing an apparent adoption by virtue of which the defendant is in possession. That article prescribed twelve years as the period of time within which a suit "to establish or set aside an adoption" might be brought, and that such period of twelve years should begin to run from "The date of the adoption, or (at the option of the plaintiff) from the date of the adoptive father's death."

Act IX of 1871 did not give to a reversioner whose right to sue for possession accrued upon the death of Hindu widow any further

(1) (1863) 9 M. I. A. 539.

(2) (1886) L. R. 13 I. A. 84.

time than the twelve years given by article 129 to any plaintiff. That Act was in force until the 19th July, 1877, when Act XV of 1877, the Indian Limitation Act, 1877, came into force, and by article 141 of the second schedule of Act XV of 1877 a Hindu entitled to the possession of immovable property on the death of a Hindu female might bring his suit for possession within twelve years from the time when the female dies. In the present case the period of limitation allowed by article 129 of Act IX of 1871 expired in 1874.

The person who at the date of the adoption in 1862 was entitled to sue to set aside the adoption must have been a reversioner to Arunachala, and looking at the pedigrees he must have been either Kalianasundara or Chokkappa, and it has not been pleaded or otherwise alleged that they were at the time of the adoption under the age of 18 years so as to entitle them to an extension of the period allowable to a minor under section 7, Act IX of 1871, to bring a suit. It is obvious, looking at the facts and dates in the present case, that Kalianasundara and Chokkappa must have arrived at full age long before Act IX of 1871 expired and that that Act applied.

In the present suit the Subordinate Judge found that the question as to the adoption of Arunachala was *res judicata*, but Sir John Wallis, C.J., and Mr. Justice Burn, in the appeal to the High Court, decided that the principle of *res judicata* did not apply. On that subject their Lordships do not consider it necessary to express an opinion.

It has been arranged by the parties through their respective counsel and their respective solicitors in the best interests of their clients that the plaintiffs' appeal, No. 124 of 1923, and the first defendants' appeal, No. 128 of 1923, which relates to the village of Enkan, should be dismissed, and that there should be no order as to costs in either of these appeals in which other respondents have not appeared. It has also been arranged by the parties through their respective counsel and their respective solicitors in the best interests of their clients that the plaintiffs' appeal, No. 125 of 1923, should be dismissed without costs on either side, the plaintiffs having admitted that the late husband of the first defendant was not disqualified from inheriting along with the plaintiffs. Except as above arranged by the parties it appears to their Lordships that all the appeals should be dismissed with costs, and their Lordships will so accordingly humbly advise His Majesty.

Since the hearing of these appeals some of the parties, their

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Lordships understand, have entered into compromises. On production of the proper evidence, effect to these compromises will be given in the Order in Council confirming this report.

T. L. Wilson & Co.: Solicitors for Vaithialingam Mudaliar and others.

Chapman-Walker and *Shepherd*: Solicitors for Srirangath Anni and others.

D. Grant: Solicitor for Somasundaram Chettiar and A. Rangasami Chettiar and others.

A. de M.

Appeals dismissed.

APPELLATE CIVIL.

Before Mr. Justice Suhrawardy, and Mr. Justice Duval.

AMBICA CHARAN BAKTA

v.

RAM PROSAD CHATTERJEE AND OTHERS*

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Limitation—Limitation Act (IX of 1908), Sch. I. Art. 11A.—Decree-holder auction-purchaser—Application under O. 21 R. 100 Civil Procedure Code (Act V. of 1908), granted—O. 21 R. 103 C. P. C., scope of—Suit for ejectment—Causes of action—Merger—Bengal Tenancy Act (VIII of 1885), Sec. 22.

The suit contemplated by order 21 rule 103 of the Code of Civil Procedure is a suit by a person who is kept out of possession of the property purchased in execution of the decree and claims possession under his auction purchase. It does not concern itself with any other cause of action which such person apart from his character as auction-purchaser may have against the defendant. In a suit under O. 21 R. 103, the cause of action is an adverse decision passed under rule 101.

The plaintiffs obtained a rent decree against the heirs of their tenant and in execution of that decree purchased and took possession of the holding in suit. The defendants claiming to possess the property on their own account and not on behalf of the judgment-debtors, made an application under order 21 rule 100 of the Code of Civil Procedure for restoration of possession. On the 26th June 1917 order was passed in their favour under order 21 rule 101. In May, 1920,

*Appeals from Appellate Order Nos. 56, 57 and 58 of 1924, against the orders of Babu Atul Chandra Banerjee, Subordinate Judge of Howrah, dated the 5th July, 1923, reversing the decrees of Babu Jatindra Nath Mukerji, Munsiff, 1st Court, of Uluberia, dated the 28th June, 1921.

the plaintiffs instituted the present suits for ejectment on the ground that the defendants being purchasers of a non-transferable occupancy holding were trespassers :

Held, that the suits were not barred under article 11A, schedule I of the Limitation Act:

That order 21 rule 103 of the Code of Civil Procedure had no application, as the suits were based not on the adverse decisions against the plaintiffs in proceedings under order 21 rule 100 of the Code, but on the transfer by the tenants of the non-transferable occupancy holding.

That the contention that under section 22 of the Bengal Tenancy Act as the tenancy got merged in the landlords' superior interest, their only remedy was to proceed as auction-purchaser under order 21 rule 103 of the Code of Civil Procedure their character as landlords having been lost by virtue of the purchase of the holding, was not correct.

Appeals by the Defendants.

Suit for ejectment.

The suits were dismissed as barred by limitation by the primary Court. On appeal, the decrees were reversed and the suits were remanded for retrial on the merits. Against these orders of remand, three appeals were preferred. The other material facts appear from the judgment.

Dr. Bijan Kumar Mukherjee for the Appellants.

Dr. Sarat Chandra Basak and *Babu Radhika Ranjan Guha* for the Respondents.

The judgment of the Court was as follows :

This case raises an interesting question which does not seem to have come up for consideration before. The facts are that the plaintiffs respondents obtained a rent decree against the heirs of the tenant Gaganeswar Mandal and in execution of that decree purchased and took possession of the holding in suit. The defendants thereupon alleging dispossession made an application under order XXI rule 100 Civil Procedure Code for restoration of possession. On the 26th June 1917 order was passed in their favour under order XXI rule 101. The plaintiffs instituted the present suit in May 1920. It is accordingly maintained by the appellants that the suit is barred under article 11-A of the Limitation Act, having been brought more than a year after the order under order XXI, rule 101 was passed. The trial Court gave effect to this contention but the learned Subordinate Judge held that the plaintiffs' suit is not barred under the above article of the Limitation Act. In this appeal the appellant argues on the same line as adopted by the learned Munsiff. What happened was this :

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The plaintiffs as decree-holder auction-purchaser took possession of the holding which they purchased in execution of the decree but were dispossessed therefrom by order of Court by the defendants claiming to possess the property on their own account and not on behalf of the judgment-debtor. The plaintiffs thereupon became aware that their tenant had parted with the holding wrongfully and brought the present suit for ejectment. The question raised in the suit is whether the tenants had a transferable or a non-transferable interest in the holding.

Order 21 rule 100 contemplates a case where a person has been dispossessed by an auction-purchaser taking possession of the property through the help of the Court. He then complains to the Court of such dispossession and the Court after making a summary investigation, if it holds that the applicant was in possession of the property on his own account and not on account of the judgment-debtor directs under rule 101 that possession be given back to the applicant. The party against whom this order is passed may then institute a suit under order XXI rule 103 to establish the right which he claims to the present possession of the property. Reading these sections together it cannot be questioned that the suit contemplated by rule 103 is a suit by a person who is kept out of possession of the property purchased in execution of the decree and claims possession under his auction purchase. It does not concern itself with any other cause of action which such person apart from his character as auction-purchaser may have against the defendant. If a suit is not brought under rule 103 within the statutory period, to bring a suit to establish the claim of the plaintiff as auction-purchaser for possession of the property is lost. But if he has any other cause of action against the opposite party, it cannot be said that this provision in the chapter relating to execution of decrees bars his suit based on such cause of action. In the present case the suit is brought by the plaintiffs not in their character as auction-purchasers but as landlords. In the plaint, the cause of action in the suit is based not on the adverse decision against them in proceedings under rule 100, but on the transfer by the tenants of their non-transferable occupancy holding the information of which he got during the course of the execution proceedings. The causes of action of the two suits—one under rule 103 and another as brought by the plaintiffs—must therefore be different. In a suit under rule 103, the cause of action must be adverse decision passed under rule 101. But the present suit is based upon a different state

of facts. The cause of action is not the loss of possession by the defendants from the plaintiffs in connection with the execution proceedings but the fact that the tenants had unlawfully transferred a non-transferable occupancy holding to the defendants and hence the holding is treated as abandoned under the Bengal Tenancy Act and the landlords are therefore entitled to possession of the holding which the defendants are in possession of as trespassers. But it is argued by the learned vakil for the appellant that under section 22 Bengal Tenancy Act, the landlords having purchased the holding in execution of the rent decree, the tenancy got merged in the landlord's superior interest and therefore the only remedy the landlords now have is to proceed as auction-purchasers under order XXI rule 103, their character as landlords having been lost by virtue of the purchase of the holding. We do not think that this contention is right. It is the case of the defendants that the tenants had a transferable occupancy holding. It further appears that the defendants are in possession of the land for more than 12 years. He accordingly contends that the plaintiffs are not entitled to possession because the tenants had a transferable interest in the holding and that the defendants have acquired the rights of a tenant in it. The present suit as brought by the plaintiffs is totally unconnected with the execution proceedings. It seems that the plaintiffs have abandoned all their right in the execution sale, it having been found against them that the defendants are entitled to immediate possession. In these circumstances we do not think that the present suit is barred under article 11-A of the Limitation Act.

The appeals accordingly fail and are dismissed with costs—two gold mohurs in each case.

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Appeals dismissed.

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*Before Sir William Ewart Greaves, Knight, Judge, and
Mr. Justice B. B. Ghose.*

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MAHIM CHÂNDRA DEY

v.

RAM DAYAL DUTTA AND OTHERS.

Admissibility of oral evidence to prove release—Mortgage, release of—Transfer of Property Act (Act IV of 1882), chapter VII—Debt, release of—Security, release of.

• Oral evidence may be admitted to prove that a mortgage bond has been discharged either by full payment or partly by payment and partly by release of the debt. There is nothing in section 92 of the Evidence Act to prevent such evidence being admitted : *G. P. Mallappa v. Matum. Nagu Chetty* (1) considered, *Jagannath v. Shankar* (2) dissented from, *Ariaputhira v. Muthu Komara Swami* (3) referred to.

The release of a debt for value is not a transfer of ownership and one who releases a security without consideration may be said to make a gift of it, but the transaction does not fall under chapter VII of the Transfer of Property Act, which deals only with gifts of tangible property.

A release of a debt may be made by parol but if it is in writing it should be registered, if it falls within section 17 of the Registration Act.

Appeal by the Plaintiff.

Suit to enforce a mortgage bond.

The material facts appear from the judgment.

Dr. Radha Benode Pal and *Babu Hem Kumer Bose* for the Appellant.

Babu Annoda Charan Karkoon for the Respondents.

The judgments of the Court were as follows :

B. B. Ghose J. This appeal arises out of a suit brought on a mortgage bond. Both the Courts below found that the mortgage debt was discharged by the defendants depositing Rs. 600 and odd with the landlord with the consent of the plaintiff. The mortgage debt on that date came up to Rs. 675—7—0. Upon the finding that the mortgage debt was discharged as aforesaid both the Courts below dismissed the plaintiff's suit. The plaintiff

• Appeal from Appellate Decree No. 1323 of 1923 against the decree of B. K. Bose Esq., 2nd Additional District Judge of Mymensingh, dated the 2nd December 1923, affirming that of Babu Upendra Kumar Kar. Munsiff 1st Court of Mymensing, dated the 23rd December 1921.

(1) (1918) I. L. R. 42 Mad. 41.

(2) (1919) I. L. R. 44 Bom. 55.

(3) (1912) I. L. R. 37 Mad. 423.

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appeals and the sole contention on his behalf is that oral evidence is not admissible to prove the discharge of the debt, inasmuch as it imports an agreement to relinquish Rs. 73 odd of the mortgage debt. In support of this contention reliance has been placed upon two cases. The first of those, is the case of *G. P. Mallappa v. Matum Nagu Chetty* (1). The headnote of the case runs thus: "A subsequent oral agreement to take less than is due under a registered mortgage bond is an agreement modifying the terms of a written contract; and, if it is to be proved, oral evidence is inadmissible under section 92, proviso 4 of the Indian Evidence Act." In that case, however, it was held that the defendant was exonerated from the liability of proving the agreement, because it was admitted by the plaintiff. Under section 58 of the Evidence Act, such plea was taken into consideration and given effect to. The case only lays down the rule enacted under section 92 of the Evidence Act and can hardly be said to be an authority for the proposition advanced on behalf of the appellant. The next case relied on is that of *Jagannath v. Shankar*. (2) That case seems to be in point. There, the debtor had alleged that he had paid a sum of money in full discharge of the mortgage debt although a larger sum was due on the mortgage bond. Sir Norman Macleod C. J., observed at page 58 thus: "But the argument before us has been that there has not been a subsequent oral agreement to rescind or modify the mortgage, but there has been an actual discharge, and oral evidence was admissible to prove a discharge. In my opinion, there is no substance in that argument. The defendant's case must be that the mortgagee agreed to receive Rs. 800 in full satisfaction of the much greater amount which was due on the mortgage, and although he might have said when receiving Rs. 800. 'I now discharge you from the mortgage' there was none the less an agreement which modified the original agreement of mortgage." With all respect I am unable to accept the reasoning of the learned Chief Justice. A mortgage is discharged either by the payment of the full amount of the debt or by release of the debt itself. It has never been doubted that a discharge of the debt by payment may be proved by oral evidence. This point is not contested on behalf of the appellant. The cases in support of this will be found referred to in *Ariyaputhira Padayashi v. Mutthu Komaraswami Padayachi* (3). Oral evidence of such discharge is not excluded by any provision of section 92 of the Evidence Act. A release of

(1) (1918) I. L. R. 42 Mad. 41.

(2) (1919) I. L. R. 44 Bom. 55.

(3) (1912) I. L. R. 37 Mad. 423.

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a debt also may be effected by parol, but if it is in writing it should be registered, if it falls within the provisions of section 17 of the Registration Act. The release for value is not a transfer of ownership; and though it is true a person who releases a security without consideration may be said to make a gift of it, the transaction does not fall under Chapter VII of the Transfer of Property Act which deals only with gifts of tangible property. There is nothing in the law which requires a writing for a release of the debt by the creditor. What then is there to exclude oral evidence of the discharge of a mortgage bond when it is pleaded that it was made partly by payment of money and partly by release of the debt? If the creditor says to the debtor "I now discharge you from the debt" or if he says "I make a free gift to you of the money you owe me," I do not think that this can be called an agreement, as there is neither any promise to perform anything in future nor is there any consideration for it. Nothing has been left to be done and the transaction is completed at the moment when the release is made. Such a transaction does not fall within proviso (4) to section 92 of the Evidence Act and I do not think that oral evidence of it is excluded by that proviso. The fear expressed by the learned Chief Justice that it would be an extremely dangerous precedent if oral evidence were allowed of such a transaction does not also impress me and I think that the danger may be the other way. Such evidence has seldom been excluded in this province. It is common knowledge that when a debtor makes payment of his debt amicably to his Mahajan a remission is often made of a part of the interest due on account of the mortgage bond. If it be held that this release cannot be proved by oral evidence, the mortgagee may sue his debtor for the amount remitted years after the debt was fully discharged; and this he may do, notwithstanding that he had returned the mortgage bond to the debtor on obtaining full satisfaction, for nothing but a proper document would prove the remission. This, however, would be a position which cannot be contemplated. I, therefore, think that oral evidence may be admitted to prove that a mortgage bond has been discharged partly by payment and partly by release of the debt and there is nothing in section 92 of the Evidence Act to prevent such evidence being admitted.

On this ground, I would dismiss the appeal with costs.

Greaves, J :—I agree.

A. C. R. C.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Suhrawardy, and Mr. Justice Panton.

ABDUL (BARI) MALLICK AND ANOTHER

v.

KING-EMPEROR.*

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*Reading over evidence—Criminal Procedure Code (Act V of 1898) Sec. 360—**Depositions, when to be read over.*

Reading over depositions of all the witnesses at the close of the day is not sufficient compliance with the provisions of section 360 of the Code of Criminal Procedure : *Dargahi v. Emperor* (1) referred to.

Section 360 of Criminal Procedure Code is mandatory and its provisions must be strictly complied with. This view is based on the wording of the section and the policy underlying it, namely, to protect the witness and also to safeguard the interest of the accused by affording to the witness as well as the accused an opportunity of finding any inaccuracy in the record of the depositions : *Hiralal Ghose v. Emperor* (2) referred to.

It is desirable that the evidence of each witness should be read over to him after it is completed before the evidence of another witness commences; and the reading over should not be postponed till all the witnesses are examined.

Appeal by the Accused.

The first accused was convicted under section 304 of Indian Penal Code and sentenced to 10 years' rigorous imprisonment and the second accused was convicted under section 326 and sentenced to the same term of imprisonment.

The material facts appear from the judgment.

Babu Debendra Narayan Bhattacharjee for the Appellants.

Mr. Khundkar for the Crown.

The judgments of the Court were as follows :

Suhrawardy, J : The two appellants have been convicted by the Additional Sessions Judge of 24-Parganahs in agreement with the verdict of the majority of the jury under sections 304 and 326 Indian Penal Code. The first accused was convicted under section 304 and sentenced to 10 years' rigorous imprisonment. The second accused was found guilty under section 326 and sentenced

July, 7.

*Criminal Appeal No. 105 of 1925 against the order of D. Vaughan Stevens Esq., and Additional Sessions Judge of 24 Parganas, dated the 8th January 1925.

(1) (1924) I. L. R. 52 Calc. 499.

(2) (1924) I. L. R. 52 Calc. 159.

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to undergo the same term of imprisonment. Various objections have been taken on the ground of misdirections in the learned Judge's charge to the jury ; but it is not necessary to consider them as we find ourselves constrained to order a retrial on the ground that the provisions of section 360 Criminal Procedure Code, have not been complied with. An affidavit has been filed on behalf of the accused in which it is stated that the deposition of each of the prosecution witnesses was not read over or explained to him after it had been recorded and before the examination of the next witness was commenced ; but that the depositions of the witnesses examined on the day were read over to them after the close of the day's proceedings. The learned Deputy Legal Remembrancer in order to be sure of the truth or otherwise of this allegation made a reference to the learned Sessions Judge and an affidavit sworn by one Atul Chandra Banerjee, Bench clerk of the Second Additional Sessions Judge of Alipore has been placed before us. The deponent states as follows : " I read over and explained the depositions of the witnesses in the presence and hearing of the accused at the end of the day when the examination of all the witnesses for the day was closed." It is therefore clear that the procedure that was followed was that the depositions of all the witnesses were read over to them at the close of the day. This in our opinion is not sufficient compliance with the provisions of section 360 Criminal Procedure Code. It has been held in the case of *Hiralal Ghose v. Emperor* (1) that section 360 is mandatory and its provision must be strictly complied with. This view is based on the wording of the section itself and on the policy underlying it, namely, to protect the witness and also to safeguard the interest of the accused by affording to the witness as well as the accused an opportunity of finding any inaccuracy in the record of the deposition. In *Dargahi v. Emperor* (2) the same learned Judges who decided the case of *Hiralal Ghose v. Emperor* (1) had to consider a similar question with regard to the provisions of the section. There the deposition of a witness was read over to him when another witness was being examined in Court. The learned Judges deprecated the procedure and were of opinion that it was not a strict compliance with the provisions of section 360 Criminal Procedure Code ; and in expressing that opinion they made the following observation : " That clause provides that as the evidence of each witness is completed, it shall be read over before the examination of another witness is commenced." If it is once

(1) (1924) I. L. R. 52 Calc. 159. (2) (1924) I. L. R. 52 Calc. 499.

conceded that section 360 is mandatory, it follows that its provisions must be strictly complied with. The section says that "as the evidence of each witness taken under section 356 or section 357 is completed it shall be read over to him in the presence of the accused and etc." The plain meaning to my mind is that the deposition of a witness must be read to him as it is completed. The practice of reading over the depositions of all the witnesses examined on one day at the end of the day may commend itself as intended to save public time; but it is not in strict conformity with the requirements of the law; and, experience gained in this case shows that more public time will be wasted in the retrial of the case than what was saved by the procedure adopted. The practice of reading over depositions of several witnesses at one time may also defeat the object of the section as laid down in the case of *Hiralal Ghose v. Emperor* (1). The accused or his lawyer may not remember the exact words used or the form of the answer given. It is therefore desirable that the provisions of section 360 Criminal Procedure Code should be strictly observed and the evidence of each witness read over to him after it is completed before the evidence of another witness commences; and the reading over should not be postponed till all the witnesses are examined. In this view the trial before the Additional Sessions Judge must be held to be vitiated by this defect in the procedure.

The appeal accordingly succeeds, the conviction of and the sentences passed on the appellants are set aside and we direct that they be retried according to law. The appellants will remain in jail until further order by the trying Court.

Panton, J.:—I agree that the conviction and sentence of the appellants must be set aside as this appears to me to be the inevitable result of the earlier decisions of this Court just quoted by my learned brother.

A. C. R. C.

Appeal allowed

(1) (1924) I. L. R. 52 Calc. 159.

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CIVIL RULE.

Before Mr. Justice Cuming, and Mr. Justice B. B. Ghose.

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November, 13, 16.

L. R. COUNSELL

v.

SM. SUKUMARI DEBI.*

Jurisdiction—Revision—President of tribunal expressing opinion on a point on which no opinion was expressed by the Rent Controller—The Calcutta Rent Act, (III of 1920). Secs. 15 Sub-Sec. (3), cl (d), 18, 24—Order fixing standard rent on compromise, if in rem.

The President of the Tribunal has no jurisdiction under section 18 or section 24 of the Calcutta Rent Act to express his opinion as to whether the rent paid on the 1st of November, 1918, was unduly low or not, in the absence of anything to show that the Rent Controller was invited to express his opinion upon that point.

Order fixing standard rent on compromise is not an order *in rem*.

Section 24 of the Calcutta Rent Act lays down that where there is a decision of the Controller on a particular question, the President in revising that decision may take further evidence and come to his own conclusion having the decision of the Controller before him.

Under the Calcutta Rent Act, the Controller should first form his opinion whether the rent on the prescribed date was unduly low under sub-section (3) clause (d) of section 15 and then he is to exercise his discretion in fixing the standard rent; when he does that, it is open to the President of the Tribunal to revise that order on an application made by any of the parties.

Where the decision of the Rent Controller is not sought for on a particular point, it is not open to any of the parties by an application for revision to the President of the Tribunal to start a new point altogether and to have his decision.

Application for Revision under section 115 of the Code of Civil Procedure and under section 107 of the Government of India Act by the Tenant.

Application for fixing a standard rent by the tenant.

The material facts appear from the judgment.

Dr. D. N. Mitter and Babu Hira Lal Ganguly for the Petitioner.

Sir Provas Chandra Mitter and Babu Hira Lal Chakravarti for the Opposite Party.

* Civil Rule No. 1085 of 1925, against the order of S. C. Banerjee Esq., President of the Tribunal, dated the 17th August, 1925, on revision from the order of Babu B. D. Banerjee, Rent Controller, dated the 23rd November, 1923.

The judgments of the Court were as follows :

B. B. Ghose, J : This case came before this Court once on a previous occasion from a decision of the President of the Tribunal. On that occasion the President had dismissed the application for fixing a standard rent on the ground that the demised premises did not fall within the provisions of the Calcutta Rent Act. The decision of the learned President of the Tribunal was set aside by this Court and the case was sent back to him for trial of the other issues involved in the case.

The present Rule was obtained by the tenant for the revision of the judgment now pronounced by the President fixing the standard rent in revision of the standard rent fixed by the Rent Controller.

Before the Rent Controller the relevant question that was raised apparently was that the premises were let out on a higher rent than what was alleged by the tenant on the 1st of November 1918. The pleader for the landlady made an application before the Rent Controller to the effect that the hearing of the matter should be adjourned till the decision of an appeal arising out of a suit for rent brought in the Alipore Court was decided. This the Controller refused to do. Upon that the pleader appearing for the landlady did not choose to take any part in the proceedings and did not cross examine any of the witnesses examined on behalf of the tenant who was the petitioner before the Rent Controller. On the evidence the Rent Controller found that the premises were let out on a rent of Rs. 235 per month on the first of November 1918 and adding 10 per cent to that amount he fixed Rs. 259 as the standard rent for the demised premises.

The landlady applied for revision of that order under section 18 of the Rent Act on various pleas. A large number of issues were framed by the President. The material finding with regard to the rent at which the premises were let on the 1st of November 1918 as found by the Controller was affirmed by the President of the Tribunal. The learned President then took up for his consideration what were the 5th and 6th issues before him. These had reference to the fact whether a standard rent had been previously fixed with regard to the premises between two persons, namely, Tuni Meerza and Wishart and to a previous order with regard to the fixing of standard rent of a portion of the building which is now in question which is said to have been 4th of the disputed premises. The President while observing that fixing of

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standard rent is an order in *rem* did not accept the fixing of the standard rent between Tuni Meerza and Wishart as such on the ground that the order was passed on compromise between the parties. He, therefore, used the fact that the rent was standardized only as a piece of evidence in coming to his conclusion and he made the same use of the standard rent fixed for the portion of the premises. The argument which he used was that in fixing the rent for the portion (4th of the demised premises) the Rent Controller took into account what he thought to be the proper standard rent of the entire premises. This finding he used for the purpose of coming to his conclusion, which is the vital question in this case, that the rent at which the premises were let on the 1st November 1918 was too low. There was another fact which he took into consideration in coming to his conclusion and it was that the premises were let out at Rs. 280 in November 1913.

The decision of the President turned upon the question, involved in 4th issue before him.

The point taken on behalf of the petitioner before us may be shortly stated thus: Under section 15 sub-section 3 clause (d) the Rent Controller may fix the standard rent at such amount as he deems just where the rent paid on the 1st day of November 1918 was in the opinion of the Controller unduly low, and the discretion of the Controller is limited by the first portion of the proviso (i) where it is stated that under clause (d) the standard rent shall not be fixed at a higher amount than the highest rent actually paid for the premises at any time since the 1st day of November 1913. As I have already stated the procedure followed by the opposite party before the Rent Controller was such that the Rent Controller was not called upon to exercise his judgment and to give his opinion as to whether the rent which was paid on the 1st November 1918 was unduly low or not. The Rent Controller found the rent as it was on the specified date. There was a dispute as regards the amount of rent paid at the time which he decided in favour of the allegation made by the tenant and which has been found to be correct by the President of the Tribunal. Can the landlady under such circumstances by an application for revision of the order of the Rent Controller under section 18 of the Act start a new point and allege that the rent at that time was unduly low and ask for the opinion of the President and get a standard rent fixed on that basis by the President?

It seems to me that the contention on behalf of the petitioner is sound. I think that under the Act the Controller should first

form his opinion whether the rent on the prescribed date was unduly low under clause (d) of section 15 (3) of the Rent Act; and then he is to exercise his discretion in fixing the standard rent, when he does, that it is open to the President of the Tribunal to revise that order on an application made by any of the parties. It seems to me a wrong application of the word "revision" to say that although the decision of the Rent Controller was not sought for on a particular point it was open to any of the parties by an application for revision to the President of the Tribunal to start a new point altogether and to have his decision,—not revising a decision of the Rent Controller but a new decision of his own for the first time.

It is contended on behalf of the opposite party that section 24 of the Rent Act which lays down that in revising the decision of the Rent Controller the President of the Tribunal shall follow, as nearly as may be, the procedure laid down in the Code of Civil Procedure for the regular trial of suits, implies that the President can treat the application for revision as a suit irrespective of what was done before the Rent Controller. It seems to me that that is not the proper reading of that section. Although it is difficult to understand what is really meant by that provision, it seems, to be clear that the President of the Tribunal is to follow the procedure laid down in revising a decision of the Rent Controller. If there is no decision of the Rent Controller to revise there is nothing which the President of the Tribunal can revise. Apparently this section lays down that where there is a decision of the Controller on a particular question the President in revising that decision may take further evidence and come to his own conclusion having the decision of the Controller before him.

It seems to me therefore that the President of the Tribunal had no jurisdiction under section 18 or section 24 of the Rent Act to express his opinion as to whether the rent paid on the 1st of November 1918 was unduly low or not in the absence of anything to show that the Rent Controller was invited to express his opinion upon that point.

It has been further argued on behalf of the opposite party that assuming that the President had no jurisdiction to fix the standard on the basis that the rent paid on the 1st of November 1918 was unduly low he has fixed the standard rent after taking into consideration the two proceedings before the Rent Controller to which I have already referred. But the judgment of the President of the Tribunal can hardly be construed in that way. It is quite clear that he treats the decisions in both the proceedings as evidence for

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the purpose of coming to the conclusion that the rent paid on the 1st November, 1918 was too low.

An attempt was made to support the decision of the President of the Tribunal on the ground that the standard rent fixed in the case between *Tuni Meersa v. Wishart* should be considered as a decision *in rem*, because although there is a recital of the decision having been arrived at on consent the Rent Controller was not authorized to fix a standard rent on consent of the parties. That may be so. But it is quite clear that the Rent Controller who had decided that case treated his decision as having been arrived at on consent of parties. If that is so the President of the Tribunal was quite right in his opinion that it could not operate as a judgment *in rem*. Nor could the decision fixing a standard rent of a portion of the premises be so considered, as the two premises are not identical.

In my opinion, therefore, the judgment of the President of the Tribunal cannot stand and must be reversed and the decision of the Rent Controller restored.

The Rule is made absolute with costs. The hearing fee will be five gold mohurs.

Cuming, J. : I agree

A. T. M.

Rule made absolute.

PRIVY COUNCIL.

PRESENT.—Lord Shaw, Lord Carson, Sir John Edge, and
Mr. Ameer Ali.

SOURENDRA MOHAN SINHA AND OTHERS

v.

HARI PRASAD SINHA AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT PATNA.]

Hindu Law—Mithila School—Mortgage of joint family property—Compound interest—Transfer of Property Act (IV of 1882), secs. 86 and 90—Sonthal Parganas Regulation (III of 1872 as amended by Regulation V of 1893), secs. 5 and 6—Sonthal Parganas Settlement (Amendment) Regulation (III of 1908), sec. 5—Notification re-settlement in Calcutta Gazette—Jurisdiction of Subordinate Judge—Claim for personal decrees against

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mortgagors—Civil Procedure Code (Act V of 1908), sec 11.—Res judicata—Civil Procedure Code, Sec. 34—Interest post the date of institution of suit—Successor in office of Judge, if can alter his predecessor's order—Splitting up of cause of action—Appeal to Privy Council—Suit involving a prolonged examination of numerous items of advances and loans.

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In 1896, the adult members of a joint Hindu family, for themselves and the minor members thereof, executed a mortgage of family property partly in Bhagalpur and the greater part was situated in the Sonthal Parganas, to secure the repayment on or before 14th March 1908 of Rs. 3½ lakhs, principal money, and thereafter compound interest thereon at 7½ per cent with yearly rests.

In 1904 (when no settlement of the Sonthal Parganas had yet been made, or notified as required by the Sonthal Parganas Regulation, III of 1872, section 6, in the *Calcutta Gazette*), the representatives in interest of the deceased mortgagee instituted, before the Subordinate Judge, Bhagalpur, a suit upon the mortgage against the then members of the joint family and others who derived title through them, claiming a decree for sale of the mortgaged property, and foreclosure, under sections 86 and 90 of the Transfer of Property Act, and for "such other reliefs as may under the circumstances of the case be deemed proper may be granted", but not specifically praying for a personal decree. That suit was ultimately on appeal dismissed by the Privy Council in May 1914 on the ground of want of jurisdiction of the Bhagalpur Court in the then circumstances by virtue of the aforesaid Regulation; see *Maha Prasad v. Ramani Mohon Singh* (1).

Subsequently, the settlement operations of lands in the Sonthal Parganas (including those comprised in the mortgage) having been completed and duly notified in the *Calcutta Gazette* in accordance with section 5 of the Sonthal Parganas Settlement (Amendment) Regulation, No. III of 1908, which replaced the aforesaid Regulation of 1872 the mortgagee's representatives instituted a fresh suit to enforce the mortgage in 1915 in the Court of the said Subordinate Judge, and claimed both a decree for sale and a personal decree. The mortgagors' representatives pleaded *inter alia* that the judgment of the Privy Council in the 1904 suit operated as *res judicata*, and barred a fresh action upon the same mortgage; that compound interest was illegal and that all interest already paid in compliance with the deed should be refunded; and that under the Mithila school of Hindu Law, the joint family was not liable for a debt not contracted by a common ancestor of all its members, and that a member of such family was not liable for any contracted by the ancestor jointly with another person:

Held, (i) That the Court of the Subordinate Judge had jurisdiction in the Sonthal Parganas within the meaning of section 6 of the Regulation III of 1872, as amended in 1893; (ii) the Court of the Subordinate Judge, Bhagalpur, being in 1915 a Court having jurisdiction under section 5 of the Regulation of 1908, which it was not at the time of the institution of the first suit in 1904, the judgment in the 1904 suit did not act as *res judicata* against the new suit; but in so far as the relief by a personal decree was implicitly included in the general

(i) (1914) L. R. 41 I. A. 197; I. L. R. 41 Calc. 116; 20 C. L. J. 241.

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relief claimed in the first suit, the grant of such personal decree in the second suit was barred by reason of the Civil Procedure Code, sec. 11, and Explanation thereto; (iii) in exercising his jurisdiction, the Subordinate Judge was bound to conform strictly to the requirements of section 6 of the Sonthal Parganas Settlement Regulation No. III of 1872, as amended by Regulation No. V of 1893, and to disallow compound interest and all interest paid in excess of that specifically prescribed therein; *Ram Chandra Marwari v. Keshobati Kumari* (1) approved; (iv) it is not inconsistent with the principles of the Mithila (which for the most part is identical with the Mitakshara) school of Hindu Law that a member or descendant of a joint family should be liable for a debt contracted by an ancestor alone apart from another member of the family: *Bhagbut Pershad Singh v. Girja Koer* (2) referred to.

The effect of section 5 of Regulation III of 1908 which replaced section 5 of Regulation III of 1872, has been to exclude for the future after that substitution the jurisdiction of the civil Courts to try cases relating to any lands in the Sonthal Parganas only during such period as that land should be under settlement the period being reckoned from the time when the land is under settlement to the time when the settlement is completed.

The allowance of interest post the date of the institution of a suit is by the section 34 of the Code of Civil Procedure within the discretion of the Court. As a rule the Privy Council does not interfere with such discretion exercised by the Court below.

The successor in office of the Judge has not the power to alter a decree made by his predecessor.

It is the policy of the Code of Civil Procedure, that parties should not have the right to split up a cause of action against defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit.

In an appeal from the decree of a High Court in a suit which involved a prolonged examination of numerous items of advances and loans and of the evidence relating to them by a High Court, those who impugn before the Privy Council the findings of fact by the High Court upon which it based its decree, must draw the attention of the Board to the material evidence which they suggest that the High Court misunderstood or failed to appreciate, and on which they contend that the Board should come to a conclusion different from that at which the High Court arrived.

Two consolidated cross-appeals from a decree dated 12th April 1922, of the High Court (Dawson Millar, C. J., and Bucknill, J.) which varied a decree dated 17th June 1918 of the Subordinate Judge, Bhagalpur (H. N. Majumdar, Esq.,).

The facts and arguments appear from the judgment of their Lordships.

(1) (1904) 1 Q. L. J. 182.

(2) (1888) I. L. R. 15 Calc. 717.

L. deGruyther K. C. and *S. Hyam* for the Appellants
Sir G. Lowndes K. C. and *E. B. Raikes* for the Respondents.

The judgment of the Board was delivered by

Sir John Edge: These are two consolidated appeals from a decree of the 14th April, 1922, of the High Court at Patna, which varied a decree of the 17th June, 1918, of the Subordinate Judge of Bhagalpur.

The suit in which these consolidated appeals have arisen was instituted in the Court of the Subordinate Judge of Bhagalpur on the 5th February, 1915. The plaintiffs claimed Rs. 11,81,811 principal and interest alleged to be then due under a mortgage bond of the 21st December, 1896, for Rs. 3,50,000, of which Rs. 1,36,142 were advanced in cash, the balance being money alleged to be due under a previous bond of the 3rd October, 1883, and for moneys advanced at various times, and for interest at various rates. The bond in suit provided that the principal sum of Rs. 3,50,000 was to carry $7\frac{1}{2}$ per centum compound interest with yearly rests. The principal was repayable in the month of Phagon, 1310 Fasli, the last day of which month was the 14th March, A.D. 1903. The bond was executed by all the adult male members of the joint family, the members of which family lived in the Sonthal Parganas, and was also executed by them on behalf of all the minor members of the joint family as their guardians. It was intended that the bond should bind all the members of the joint family and the property mentioned in the bond. All the defendants, except, as later in this paragraph is mentioned, are members of the joint family. The joint family is governed by the school of Hindu law of the Mithila. The grantee of the bond, who was the mortgagee, was Surja Narain Singh, Bahadur, of the District of Bhagalpur, by profession a pleader, who had occasionally acted for the joint family, and knew its financial position; he died long before this suit was brought, and the plaintiffs are his representatives and are the persons in whom are vested his rights under the bond. The defendant, Dwarka Prasad Singh, was by birth a member of the joint family. Since the bond was made he was adopted into another family. The other defendants, who are not members of the joint family, claim through the joint family. The executants of the bond, in addition to granting the rights of a mortgagee to Surja Narain Singh, declared by the bond that they should jointly and severally pay the principal and interest, simple and compound, for which the bond was given.

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A previous suit on the same mortgage bond of the 21st December, 1896, had been brought in the Court of the Subordinate Judge of Bhagalpur on the 20th June, 1904, by the then representatives in interest of Surja Narain Singh, the deceased mortgagee, against the then members of the joint family and others who claimed title through members of that family. That suit of 1904 came on appeal to His Majesty in Council and was dismissed by his Majesty in Council acting upon and adopting the advice tendered to His Majesty in a judgment of the Board which was delivered on the 19th May, 1914, by Lord Moulton. In considering the advice which it will be the duty of their Lordships to tender to his Majesty in these consolidated appeals, it will be necessary to refer at some length to the judgment of the Board of the 19th May, 1914. That judgment of the Board is reported in 41 I.A. 197.

In each of the suits the main claim was for a decree which might be executed by a sale of the mortgaged property on default of payment by the mortgagors of the amount decreed to be due under the mortgage bond. In each of the suits there was a claim for such other relief as the plaintiffs might be entitled to, which would include a decree on the personal liability under the mortgage bond of the persons who might be the mortgagors. The property mortgaged was the joint property of the joint family, the greater part of which was situate within the Sonthal Parganas. That joint property extended from the Sonthal Parganas into the district of Bhagalpur, and the smaller part of the joint property thus happened to be situate within the local limits of the ordinary jurisdiction of the Subordinate Judge of Bhagalpur. The mortgage bond was executed in Bhagalpur and was registered in the Bhagalpur Registry.

The mortgage bond has been translated, and to that translation their Lordships will refer. By their bond the mortgagors declared that they would repay to the mortgagee the said sum of Rs. 3,500,000 in the month of Phagon, 1310 Fasli, and further declared that they should pay interest on the Rs. 3,500,000 at the rate of $7\frac{1}{2}$ per centum per annum on the 1st Phagon, 1304 Fasli, and thereafter every year on the 1st Phagon, and that if they should fail to pay such interest the interest should be treated as principal, and interest on interest should be charged at $7\frac{1}{2}$ per centum per annum and converted into principal after the 1st of Phagon, and the compound interest should be paid by them to the mortgagee, and that even after the expiry of the due date of payment (the 1st of Phagon, 1310 Fasli) they should pay such compound

interest, and that "the rates and stipulations as regards interest should in no case be reduced and changed either before or after a decree is passed."

The mortgage bond also contained, amongst others, the following agreements by the mortgagors:—

"6. We do declare that we shall be jointly and severally bound to pay the principal, interest, compound interest as well as costs incurred in Court or privately, by the said Rai Bahadur, for realisation of the debt."

"7. For payment of the principal, interest, compound interest and costs referred to above, we the executants have mortgaged and hypothecated the properties mentioned in Schedule No. 2 of this deed to the said Rai Bahadur subject to the mortgage lien created under the bond dated the 11th Assin, 1299 F. This is the first mortgage, and in support of continuation of the mortgage, the said bond has been left with the said Rai Bahadur and the amount due on the said bond has been included in this bond. Save and except the amount due under this bond there is nothing due by us to the said Rai Bahadur. If we do not pay the money due to the said Rai Bahadur as stipulated in this bond, he shall be at liberty to bring a suit and to realise his dues together with costs, if any, by sale of all or any of the mortgaged properties or any portion thereof or from our person or other properties. We the executants shall not put forward any plea that the mortgaged properties should be sold first and after that the amount with cost be realised from our person and other properties. The said Rai Bahadur shall be at liberty to bring the mortgaged properties to sale first or last.

"8. If the interest be not paid as stipulated in this bond, the said Rai Bahadur shall be competent to bring a suit and to realise the interest and compound interest by sale of all or any of the mortgaged properties or any portion thereof from our person or other properties. The mortgaged properties which will be sold for realisation of the interest will be sold free of encumbrances of the balance of the loan and future interest and the same will be considered to have been sold. If there be any surplus sale proceeds after satisfaction of the interest and compound interest for which a suit might have been brought, the same shall be taken by the said Rai Bahadur towards payment of his (principal) dues. We the executants or any other person shall have no right to the said surplus sale proceeds. By the stipulations contained in this paragraph the said Rai Bahadur shall not be bound to sue for interest and compound interest (alone) but shall be at liberty to sue for the

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interest and compound interest or to sue for the same along with his suit for the principal, when he will be entitled to do so."

Clause 16 of the bond is as follows :—

"16. This loan has been taken at Bhagalpur. The said Rai Bahadur shall be at liberty to bring suit in the Court of District Bhagalpur and to realise his entire dues or the interest by sale of the mortgaged properties. We the executants shall raise no objection as to the suit being tried in the Court of District Bhagalpur. If we do so the same shall not be entertainable. Some of the Mouzas, *i.e.*, the mortgaged properties No. 1, mentioned in Schedule No. 2, lie in the district of Bhagalpur, and some in the District of Sonthal Parganas."

The Sonthal Parganas were in 1872 and are still a backward district, and the Government of India considered that the inhabitants of the Sonthal Parganas and their properties in the Sonthal Parganas required some protection from the operations of money-lenders beyond the protection which was afforded by the law generally then in force in India, and enacted The Sonthal Parganas Regulation No. III of 1872 (known as the Sonthal Parganas Settlement Regulation), which came into force on the 1st May 1872, and so far as it was material was in force until Regulation No. V of 1893, and the Sonthal Parganas Settlement (Amendment) Regulation, 1908 (III of 1908) were, as later is mentioned, enacted.

Section 5 of Regulation No. III of 1872 was as follows :—

"5. Till such time as a settlement of the whole or any part of the Sonthal Parganas shall be made under the rules hereinafter provided, and the said settlement shall be declared by a notification in the Calcutta Gazette to have been completed and concluded, no suit shall lie in any Court established under the said Act 6 of 1871 in regard to any land or any interest in or arising out of any land, or for the rent or profits of any land, or regarding any village-headship or other office connected with the land, except as hereinafter provided ; but such suits shall be heard and determined by the officers appointed by the Lieutenant-Governor of Bengal under section 2 of the said Act 37 of 1855, or by the Settlement-officers hereinafter mentioned according as the said Lieutenant-Governor shall from time to time direct."

Section 6 of Regulation III. of 1872, as amended by Regulation V. of 1893, was and is as follows :—

"All Courts having jurisdiction in the Sonthal Parganas shall observe the following rules relating to usury, namely :—

"(a) interest on any debt or liability for a period exceeding one

year shall not be decreed at a higher rate than 2 per cent. per mensem, notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed.

"(b) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan.

"(1) Explanation.—The expression 'intermediate adjustment of account' in clause (a) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when, without the passing of fresh consideration, the original claim is increased by such renewal.

"(1) Illustration.—A bond is given for Rs. 75, of which Rs. 25 are interest. Unless the obligee can prove to the satisfaction of the Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75, Rs. 50 only will bear interest, and the limit of the claim on the bond will be Rs. 100."

As has been mentioned, the previous suit on the mortgage in question which came before the Board in 1914 was instituted in the Court of the Subordinate Judge of Bhagalpur, on the 20th June, 1904, and he tried the suit and made his decree therein on the 12th February, 1906. No notification that the settlement mentioned in section 5 of Regulation III of 1872, had been completed and concluded was ever made in the *Calcutta Gazette*. In the suit of 1904, the two material issues to be determined were: (a) whether the Bhagalpur Court had jurisdiction in the suit, and (b) whether the mortgagees were precluded by section 6 of Bengal Regulation III of 1872, as amended in 1893, from recovering compound interest or interest exceeding in amount the principal advanced. The Subordinate Judge, by his judgment delivered on 12th February, 1906, found all the issues in favour of the mortgagees, and made a decree under section 86 of the Transfer of Property Act, 1882 (Act IV. of 1882) for payment and for sale in the event of non-payment. From that decree the mortgagors appealed to the High Court at Calcutta, but at the hearing of that appeal the arguments were confined to issue (b). That appeal was heard by Harington and Mookerjee JJ., who dismissed the appeal, holding themselves bound by some unreported decision of their Court to the effect that the words in section 6 of Regulation III. of

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1872—"The Court having jurisdiction in the Sonthal Parganas"—meant a Court situate in that district and constituted under the Regulation, and did not include a Court situated outside, but exercising jurisdiction to order the sale of mortgaged property situated within that district. From that decree of the High Court there was the appeal to His Majesty in Council, which was before the Board in 1914. It appears that there were also then two other appeals to His Majesty in Council, one of which was from a decree of the High Court which reversed a decree of the Subordinate Judge with regard to the amount of interest recoverable under the decree of the Subordinate Judge as drawn up. Such was the position of the suit when the appeal to His Majesty in Council came before the Board in 1914.

The appeal to His Majesty in Council was elaborately and exhaustively argued by the learned counsel for the parties, and the carefully considered judgment of the Board was delivered by Lord Moulton. Much of that judgment related to the history of legislation, which had ceased to apply to the Sonthal Parganas, and to which their Lordships need not now refer. In referring to that judgment of the Board, their references are to those portions of the judgment which express the decision of the Board on questions of law which are material to the right understanding of the appeal which was before the Board. If it be the fact that some of that was *obiter*, as the High Court at Patna thought, it is not to be assumed that any of the conclusions expressed in the judgment were unsound.

In the judgment which was delivered by Lord Moulton, their Lordships then constituting the Board having mentioned that the jurisdiction of a Judge of the Courts established under the Bengal United Provinces and Assam Civil Courts Act, 1887, or its predecessor, the Bengal Civil Courts Act, 1871, extended to "suits of which the value exceeds Rs. 1,000, and which are not excluded from his cognizance by the Sonthal Parganas settlement Regulation, or by any other law for the time being in force," said that :

"they were clearly of opinion that these words of exclusion refer to section 5 of the Regulation of 1872, which excluded from the cognizance of any such Court suits relating to land, the settlement of which had not been finished and duly notified, and placed them exclusively in the hands of settlement officers or officers appointed by the Lieutenant-Governor of Bengal under section 2 of the Regulation of 1855. This exclusive jurisdiction is therefore main-

tained, and suits in regard to land which is not in districts that have been notified as being completely settled are not within the cognizance of the ordinary Courts, no matter what may be the value of the matter in dispute. It is not necessary for the purposes of this appeal to examine further into the jurisdiction of Courts established under these provisions, because the Court of Bhagalpur, in which the present action was brought, is not one of such Courts."

Later in the judgment the Board said :

"The information supplied to their Lordships by the parties as to the notifications appearing in the *Calcutta Gazette* show conclusively that, although portions of the lands mortgaged had been settled, and notification had been duly made that such settlement had been completed, at dates prior to the institution of the suit, other portions were not settled. It is clear, therefore, that the suit came within the provisions of section 5 of the Sonthal Parganas Settlement Regulation, 1872, relating to the exclusive jurisdiction of officers appointed by the Lieutenant-Governor of Bengal, or by settlement officers, inasmuch as it related to land which had not been settled, or the settlement of which had not been declared by a notification in the *Calcutta Gazette* to have been completed and concluded. The Court of Bhagalpur had, therefore, no jurisdiction to entertain the suit, and this appeal should be allowed."

"Reliance was placed by counsel for the respondents on the stipulation in the bond that the mortgagees might enforce it in the Court of Bhagalpur. Their Lordships are of opinion that this has no effect. The Court had no jurisdiction to entertain the suit which, beyond question, was a suit in regard to land in the Sonthal Parganas, and that being so the parties could not give it the necessary jurisdiction by consent. To do so would be to nullify the express prohibition of section 5 of the Sonthal Parganas Regulation, 1872, which was binding on any Court having jurisdiction in the Sonthal Parganas in the exercise of that jurisdiction."

The judgment of the Board also dealt with the question of the right of the mortgagees to claim compound interest. That question was also before the Board in one of the other appeals as to which the Board had to tender advice to His Majesty, and their Lordships held that

"Apart from the question of jurisdiction, any Court dealing with the subject-matter of the suit would be bound to give full force and effect to the provisions of section 6 of the Sonthal Parganas Settlement Regulation, 1872, relating to usury, and therefore to have

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refused to decree any compound interest arising from any intermediate adjustment of interest, or an amount of total interest exceeding the principal of the original debt or loan."

The plaintiffs in the suit of 1904 did not specifically ask the Subordinate Judge of Bhagalpur, or the High Court or the Board to grant them a decree for money in their general claim for further relief on the personal undertaking in the mortgage bond of the mortgagors to pay the debt and interest.

Their Lordships in considering the present consolidated appeals will, where necessary, follow and apply the judgment of the Board which was delivered by Lord Moulton in the previous suit, but the question as to the jurisdiction of the Court of the Subordinate Judge of Bhagalpur to entertain the present suit depends on circumstances which did not exist when the previous suit was instituted on the 20th June, 1904.

By Regulation III of 1908, sections 5 and 5A were substituted for section 5 of Regulation III of 1872. Section 5 which was substituted for section 5 of the Regulation of 1872 is as follows:—

"5. (1) From the date on which, under section 9, the Lieutenant-Governor declares, by a notification in the *Calcutta Gazette* that a settlement shall be made of the whole or any part of the Sonthal Parganas, until the date on which such settlement is declared, by a like notification, to have been completed, no suit shall lie in any Civil Court, established under the Bengal, Agra and Assam Civil Courts Act, 1887, in regard to:—

(a) any land or any interest in, or arising out of, land, or

(b) the rents or profits of any land, or

(c) any village headship or other office connected with any land, in the area covered by such first-mentioned notification; nor shall any Civil Court proceed with the hearing of any such suit which may be pending before it.

"(2) Between the dates referred to in sub-section (1), all suits of the nature therein described shall be filed before or transferred to an officer appointed by the Lieutenant-Governor under section 2 of the Sonthal Parganas Act, 1855, or section 10 of this Regulation, according as the Lieutenant-Governor may from time to time direct; and such officer shall hear and, even though during the hearing the settlement may be declared to have been completed, determine them."

Section 5A does not bear on this question of jurisdiction, and need not be considered.

Their Lordships agree with the High Court that the effect of Section 5 of Regulation III of 1908, which replaced section 5 of the Regulation of 1872, has been to exclude for the future after that substitution the jurisdiction of the Civil Courts to try cases relating to any lands in the Sonthal Parganas only during such period as that land should be under settlement, the period being reckoned from the time when the land is notified as under settlement to the time when the settlement is completed. The mortgagors were the appellants in the appeal before the High Court, and the High Court found on the evidence that the appellants in the appeal before the High Court had failed to prove that at any time the mortgaged property was notified for settlement and not notified as settled and that the defence that the Subordinate Judge of Bhagalpur had no jurisdiction to entertain the present suit failed. In their Lordships' opinion it is not shown that on the facts before the High Court the High Court came to a wrong conclusion that the Subordinate Judge of Bhagalpur had jurisdiction to entertain this suit, which was instituted on the 5th February, 1915. But in entertaining this suit the Subordinate Judge was a Court having jurisdiction in the Sonthal Parganas within the meaning of section 6 of the Regulation III of 1872, as amended in 1893.

As the mortgage was made in Bhagalpur and some part of the mortgage lands are within the local limits of the jurisdiction of the Court of the Subordinate Judge of Bhagalpur, and as the jurisdiction of the Court of the Subordinate Judge to entertain the suit on the mortgage was not on the facts of the case, which were accepted by the High Court as proved, not excluded by the substituted section 5 of the Regulation of 1872, their Lordships' accepting the findings on that question of the High Court as correct, hold that the Subordinate Judge of Bhagalpur had jurisdiction to entertain the present suit, which was instituted on the 5th February, 1915. In entertaining the suit the Subordinate Judge was a Court having jurisdiction in the Sonthal Parganas within the meaning of section 6 of Regulation III of 1872, as amended by Regulation V of 1893, and was bound in making a decree in favour of the mortgagees to comply with that section, which limited his powers. Issue 11, as amended by the Subordinate Judge, was "Are the plaintiffs (the mortgagees) entitled to (a decree for) compound interest or to one (a decree for interest) exceeding the principal (amount lent)?" The Subordinate Judge in this suit made a decree for the plaintiffs which included interest, both simple and compound, and such

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interest exceeded the amount of the original debt or loan. His decree in favour of the plaintiffs was for Rs. 15,27,997-8-3 in respect of the mortgage debt and interest thereon, and for Rs. 44,164 as a personal decree in respect of the declaration in the mortgage bond that the mortgagees would personally pay the Rs. 3,50,000, which included Rs. 12,968-11-3, which he held was not secured on the mortgaged property. From that decree the mortgagees and other defendants affected by it appealed to the High Court, not only as to the interest which had been allowed, but also as to the personal decree.

The appeal was heard by Sir Dawson Miller, C.J., and Mr. Justice Bucknill. These learned Judges carefully considered the facts of the case and applied section 6 of Regulation III of 1872 as amended in 1893. They disallowed all the compound interest on the actual debts, and thereby reduced the amount of Rs. 15,27,997 to Rs. 3,88,673, and similarly reduced the amount of the personal decree from Rs. 44,164, to Rs. 23,181. Assuming that section 6 of Regulation III of 1872, as amended in 1893, applied, it is not disputed that those reductions were correctly arrived at by the High Court. In their Lordships' opinion section 6 of Regulation III of 1872, as amended, applied.

It was also contended in the appeal to the High Court that some of the money claimed, Rs. 12,968-11-3, as a debt was not advanced for a necessity of the joint family and was not an antecedent debt for which the joint family property was liable under the mortgage bond. As to that Rs. 12,968-11-3 the High Court agreed with the Subordinate judge that the mortgaged property was not liable in respect of it, and that it might be recovered under a personal decree, but the High Court, by disallowing compound interest on it, reduced the personal decree which had been made from Rs. 44,164 to Rs. 23,181.

The High Court allowed no interest on the principal loan, as the interest which had been paid or was included in the Rs. 3,50,000 amounted to more than the money lent or advanced, and made a decree for the plaintiffs for Rs. 3,90,157, and decreed that the mortgaged property or a sufficient part of it should be sold if that amount should not be paid on or before the 11th October, 1922, and if paid on or before the 11th October, 1922, the plaintiffs should deliver up to the defendants or to such persons as they should appoint all documents in their possession, or power, relating to the mortgaged properties, and should, if so required, re-transfer the same to the defendant free from the mortgage and

from all incumbrances created by the plaintiffs or any person claiming under them. And further ordered and decreed that the plaintiffs should realise from the persons and properties of the defendants 1 to 5 the sum of Rs. 23,270 on their personal liability, and also ordered and decreed that the plaintiffs, respondents in the appeal to the High Court, should pay to the defendants the sum of Rs. 6,012 being the proportionate costs incurred by the defendants in the High Court.

From that decree of the High Court these consolidated appeals have been brought. The reasons alleged by the plaintiffs in their case are, so far as it is necessary to refer to them, that section 6 of the Regulation III of 1872, as amended in 1893, does not apply; that the payments already made in respect of interest ought not to have been deducted from the sum of Rs. 3,50,000, and that in any case the High Court should have allowed interest at Rs. 6 per centum from the date of the institution of the suit. The reasons alleged by the defendants in their case are, so far as it is necessary to refer to them, that the claim for a personal decree is barred; that the mortgage bond did not bind the joint family except for the debts which the High Court found to have been contracted for necessity; and that under the Mithila School of Law the joint family could not be bound by any debt which was not originally contracted by a common ancestor of all its members, and that in such a family a descendant is not liable for any debt for which his ancestor was liable jointly with another person.

As to the contention on behalf of the plaintiffs that section 6 of the Regulation III of 1872, as amended in 1893, does not apply and that payments already made in respect of interest ought not to have been deducted from the sum of Rs. 3,50,000. Their Lordships hold that in entertaining this suit the Subordinate Judge of Bhagalpur was a Court "having jurisdiction in the Sonthal Parganas," and they agree with the Board in the 1904 suit that any Court would be bound to give full force and effect to the provisions of section 6 of Regulation III of 1872, amended in 1893.

Section 6 of Regulation III of 1872 as amended by Regulation I of 1908 was very carefully considered in the High Court at Calcutta in 1905 in *Ram Chandra, Marwari v. Rani Keshobati Kumari* (1), in which case Maclean C.J. and Pargiter J. held that section 6, Regulation III of 1872, as amended by Regulation V of 1908, does not authorise any Court to decree as interest a larger

(1) (1905) 1 C. L. J. 182.

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sum of money than would, together with prior payments if any, equal the original loan or debt. In that case Ghose J., differing, held that all that a Court has to see to when a suit is instituted, is that the interest claimed in the suit does not exceed the limit prescribed in the section.

As to the contention on behalf of the plaintiffs that the High Court should have allowed interest from the date of the institution of the suit. Under the circumstances of this case, as will presently appear, that contention must be limited to the sum of Rs. 3,88,673. That Rs. 3,88,673 was the total sum which the High Court rightly found to be allowable in respect of the principal loan. The question as to whether interest should be allowed from the institution of the suit was considered by the High Court. The Subordinate Judge who tried the suit by his decree of the 17th June, 1918, decreed interest from the institution of the suit only on the amount of the personal decree and ordered that an account should be taken of the mortgage debt due under the mortgage bond. The taking of such an account was necessary in order to complete the decree of the Trial Judge for execution. The account was taken by his successor in the office of Subordinate Judge of Bhagalpur who had not tried the suit, but in making the final order as to the account which he made on the 14th May, 1919, he did not confine himself to making an order for the amount which on taking the account he found to be due as the mortgage debt, which would complete the decree of 17th June, 1918, of the Trial Judge, but proceeded to award interest from the date of the suit on the amount of the mortgage debt. That as appears to their Lordships was not within the scope of his powers. He was not a Judge sitting in review or in appeal. He had to take the decree of the 17th June, 1918, as it had been drawn up. He had not power to alter it. His duty was to take the account which it directed to be taken. He had power, if necessary, to order who should be liable, and to what extent, for the costs of taking the account. The allowance of interest post the date of the institution of a suit is by section 34 of the Code of Civil Procedure, 1908 (Act V of 1908), within the discretion of the Court, and as a rule the Board has not interfered with the exercise of a discretion vested in a High Court. That the High Court carefully considered whether interest should, or should not be allowed by the High Court post the date of the institution of this suit is apparent from the following passage in the judgment of the Chief Justice. He said:—

"It is not very clear why the learned Judge awarded interest

only upon the amount of the personal decree and not on the amount of the mortgage decree, but there is no cross-appeal on this question. I think there is much to be said for the argument that the Sonthal Parganas Regulation applies only to the interest to be decreed under the bond, and does not limit the powers of a Court under section 34 of the Civil Procedure Code to award interest on the decretal amount until realization. But it has been held in this Court in *Rani Keshobati Kumari against Kumar Satya Niranjan Chakraverty*, (1) that interest under the Code should not be awarded upon the decretal amount in so far as it includes interest on the principal debt or loan, but only upon the amount of the principal debt itself, as to do so would contravene the provisions of the Regulation relating to compound interest. The principle underlying this decision applies equally where the amount decreed as interest already equals the sum advanced. Although I have some doubt as to the propriety of the decision mentioned, I am not prepared to differ from the conclusion there arrived at, and I think we should follow that decision."

Their Lordships have not before them a report of the decision of the Patna High Court to which the Chief Justice referred. But it is not necessary or advisable to consider whether the discretion of the High Court on that question of post institution of the suit interest was wisely exercised or not in respect of the amount decreed on the principal sum secured by the mortgage bond.

As to the contention on behalf of the defendants that the claim for a personal decree is barred it is necessary to consider whether the plaintiffs could have made a claim for a personal decree in the suit of 1904. Each of the suits was brought on the same mortgage bond. In the suit of 1904, as in this suit, a decree for sale of the mortgaged property was the principal relief claimed. In the suit of 1904 a decree under section 90 of the Transfer of Property Act, 1882 (Act IV of 1882), was also claimed as a relief, and "such other reliefs as may under the circumstances of the case be deemed proper may be granted," the last mentioned claim is generally known as claim for general relief. In the present suit the fifth claim for relief is "That such other relief or reliefs as may under the circumstances of the case be deemed proper may be granted to the plaintiffs." It was under the fifth claim for relief that the personal decree was granted by the Subordinate Judge. Although in the suit of 1904 the Subordinate Judge had no power to make a decree for sale of the mortgaged property, he could have made, and the

(1) (1918) C. W. N. Pat. 305.

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High Court in appeal could have made, a personal decree, and the Board could have advised His Majesty that the plaintiffs were entitled to a personal decree, the plaintiffs omitted to make any specific claim for a personal decree.

The contention that the claim for a personal relief is barred arises under section 11 of the Code of Civil Procedure, 1908 (Act V of 1908), by which it is enacted that :—

"11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

* * * * *

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It is the policy of the Code of Civil Procedure, 1908, as it was the policy of the Code of Civil Procedure, 1882, that parties should not have the right to split up a cause of action against defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit. In their Lordships' opinion the right to the personal decree in this suit was barred by section 11 of Act V of 1908, and this suit must be dismissed so far as any claim for a personal decree is concerned.

As to the contention on behalf of the defendants that the bond did not bind the joint family except for the debts which the High Court found to have been contracted for necessity, the Board may observe that in an appeal from the decree of a High Court in a suit which involved, as this did, as will presently appear from a passage which their Lordships will quote from Mr. Justice Bucknill's judgment, a prolonged examination of numerous items of advances and loans and of the evidence relating to them by a High Court, those who impugn before their Lordships the findings of fact by the High Court upon which it based its decree must draw the attention of their Lordships to the material evidence which they suggest that the High Court misunderstood or failed to appreciate, and on which they contend that their Lordships should come to a conclusion different from that at which the High Court arrived. This has not been done by either side in this case, owing most probably to the fact

that it was not possible to do it. Neither side has drawn their Lordships' attention to any material evidence from which the High Court drew a conclusion of fact which their Lordships would not have drawn.

These consolidated appeals are appeals from a decree of the High Court which examined laboriously the many advances for the aggregate of which that Court made its decree. These advances were made over a series of years beginning in 1883, and extending down to 1896, and were made to one or other of the principal adult members of the joint family, and it has not been suggested that any one of those advances was made for immoral purposes, or were secret advances and made without the knowledge of the other members of the family, who were adults at the time. The members of the family were not sufficiently provident always to live within their means, and debts were incurred which it was necessary in the interests of the joint family should be discharged. Their Lordships may quote a paragraph from the judgment of Mr. Justice Bucknill in this suit which illustrates the difficulty of the enquiry as to the loans which are included in the aggregate sum. Mr. Justice Bucknill said :—

"(4) A question is as to the non-existence of legal necessity or family benefit for a large portion of the loan in question. This contention involved before the Subordinate Judge a very careful consideration of the elements of which the loan was in fact composed ; and it has also been the subject of laborious enquiry and research before this Court. In cases such as these, where, in order to find the actual origin of portions ; very often small and very often numerous, of what is a large aggregate sum of money one has to try to trace it back for a great many years, it is frequently almost impossible to deal with each individual item in any very satisfactory manner, and, indeed, it is probably doubtful if it is right or necessary so to do. The Subordinate Judge took the broad view that, in the main, old loans contracted for the purpose of paying off earlier debts of a composite character should be regarded as carrying their own burden of proof that they fell, roughly speaking, within the confines of what may properly be regarded as legal necessity or family benefit."

From an examination of such of the evidence as has been brought to their Lordships' attention their Lordships accept the conclusion of the High Court that these advances were for the necessary purposes of the joint family.

As to the remaining contention on behalf of the defendants

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based on what is said to be the law of the Mithila School that no member of a Hindu joint family subject to the law of the Mithila School is bound to pay the debt of an ancestor which was contracted jointly by the ancestor with another member of the joint family. That proposition thus broadly stated is a wide one, and would apply in the case of a son or a grandson of the ancestor who was under a pious duty to pay the debt of his father or his grandfather whether he was or was not in possession of assets which had come down to him from his father or his grandfather. That is a startling proposition. The law of the Mithila School is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila school has departed from the law of the Mitakshara. Assuming that it was a debt which, if contracted by the father or grandfather alone, it was the pious duty of the son or of the grandson, to pay it is difficult to understand on what principle of the law of the Mithila school it was not a debt which it was the pious duty of the son or grandson to pay if it were contracted jointly with another who was a member of the joint family.

Assuming that the Chief Justice was correct in stating in his judgment that Vivada Chintamani is an authority which is binding upon those who are governed by the Mithila school of Hindu law, the passages which have been cited as from it to their Lordships as appearing in the Tagore Translation at pages 34 and 35 seem to relate only to debts contracted by the ancestor with a stranger. From the judgment of the Chief Justice it appears, as was the fact, that the debt which was challenged in his Court on the authority of the Vivada Chintamani was a debt which was charged by the bond on the joint property of the family by each of the heads of the then four branches of the joint family, and all the other defendants, who were members of the joint family, were their sons or grandsons, and he observed that there was under circumstances no reason why the charges should not be held as binding upon the property in suit. With that observation of the Chief Justice, which, in their opinion, was consistent not only with commonsense, but with the law which the High Court in the appeal was administering in the suit, their Lordships agree. The Chief Justice referred *Bhagbut Pershad Singh v. Girja Koor* (1), which may have come from the Mithila country.

Their Lordships will therefore humbly advise His Majesty—
(1) that the appeal of the plaintiffs ought to be dismissed and the appeal of the defendants allowed in part and the decree of the

(1) (1888) I. L. R. 15 Cal. 717.

High Court of Judicature at Patna dated the 12th April 1922, set aside so far as it was a personal decree against the defendants and in other respects except as to costs affirmed; (2) that the decree of the Court of the Subordinate Judge at Bhagalpur, dated the 17th June 1918 for the sale of the mortgaged property and for costs ought to stand except that so far as it was a personal decree against the defendants it should be set aside; (3) that neither side ought to be allowed any costs of the appeals in the said High Court and that any costs paid under the decree of that Court ought to be returned; (4) that the time within which the defendants ought to pay into Court the sum of Rs. 3,88,673 in respect of the mortgage debt and interest ought to be extended until the expiry of eight months from the date of the receipt by the High Court of His Majesty's Order in Council herein; and (5) that there ought to be paid by the plaintiffs to the defendants their costs of these appeals.

Banar, Rogers & Nevill : Solicitors for Sourendra Mohan Sinha and others.

Watkins & Hunter : Solicitors for Hari Prasad Sinha and others

A. de M.

*Appeal of the plaintiffs dismissed : Appeal
of the defendants allowed in part.*

P. C.

1925.

Sourendra

v.
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Abduction—Summing up, object of—*Criminal Procedure Code (Act V of 1898), Sec. 297*—Cross-examination of one's witness, effect of—*Evidence Act (I of 1872), Secs. 6, 8, 45, 47, 73, 154, 157*—Earliest statement of witness, filling up gap—Statement before Sub-Inspector—Earliest version of occurrence—Res gestae—Diary—Charge—Law, how explained—*Penal Code (Act XLV of 1860), Sec. 120B.*, charge under—Handwriting—Non-direction—Jury to consider individual cases.

The object of a summing up under section 297 of the Code of Criminal Procedure is to enable the Judge to place before the jury the facts and circumstances of the case both for and against the prosecution so as to help them in arriving at a right decision upon the points which arise for their consideration.

The result of cross-examining one's own witness under section 154 of the Evidence Act is to discredit that witness altogether and not merely to get rid of a part of his testimony.

In the course of his evidence in the present trial, the witness made a statement to the effect that at a time when A asserted that he had lawfully married B, the latter remained silent. This the witness said in his examination-in-chief. The accused declined to cross-examine him. Thereupon certain questions were put to this witness by the foreman of the jury. Thereafter the prosecution again examined this witness in chief and in the course of this further examination questions were put to the witness by the prosecution in order to bring out the fact that in his depositions as given in the previous trial as also before the committing Magistrate in the commitment enquiry which preceded that trial he had made statements which would go to show that B was trembling. The Sessions Judge allowed these questions, which were questions in the nature of cross-examination, to be put to the witness. After these questions had been answered the prosecution was permitted to put in the deposition of this witness and they were marked as exhibits in the case :

Held, that the accused were prejudiced.

The net result of allowing these questions to be put by the prosecution was to deprive the accused of the benefit which might accrue to them from any statement which the witness might have made in favour of the

Abduction—(Contd.).

accused and which the defence could have availed of if the witness had been allowed to be cross-examined by the prosecution.

The party desiring to cross-examine its own witness has to take the permission of the Court, implying thereby that there is a discretion in the Court whether it would permit the witness to be cross-examined or not. That discretion has always to be exercised with caution by the Court before which the matter comes up for consideration.

Held, that the result of the procedure adopted was to deprive the accused of the benefit of any statement which the witness might have made in their favour.

That if the object of the prosecution was to show that the witness had merely omitted to mention the fact in the present trial but had spoken about it consistently before and should therefore be relied upon, they wanted to get rid of a part of the testimony of the witness and were relying upon the earlier statements as a piece of substantive evidence in the case which they could not be permitted to do. The earlier statements could not be let in under section 157 of the Evidence Act as there was nothing in the deposition of the witness in the present trial which might be corroborated by these earlier statements.

That there was no justification for the whole of the depositions being brought as evidence in the present record.

If any suggestion was made in the course of cross-examination to the effect that a witness had made a particular statement in the previous trial which as a matter of fact the witness did not make in that trial, the proper course for the Judge is to disallow the question. The whole of the deposition cannot be used for any purpose in connection with a matter like this and only particular passages which are relevant may be used by the jury.

The Judge should either at the time when a statement made by a witness recorded by the Sub-Divisional Magistrate in the course of the enquiry held by him, is admitted, or when charging the jury, tell them definitely the purpose for which the statement was admitted.

The earliest version of the occurrence as given by the informant or prosecutor, who is the principal witness to the occurrence and on whose testimony practically the whole case depends, has always to be placed before the jury in order to judge of the truth or falsity of the prosecution case.

What a witness says at the time of occurrence in respect of the occurrence itself is *res gestae* under section 6 of the Evidence Act. But his statement as to an event which took place a year ago will not be part of *res gestae*.

The fact that the prosecution challenged the authenticity of the personal diary of the Sub-Inspector as containing an interpolation and that they pointed out other circumstances which might indicate that it should not be

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relied upon does not justify the judge in withholding it entirely from the jury. A verdict obtained from the jury without placing before them the piece of evidence in favour of the defence, whatever may have been its real worth, cannot be sustained.

It is not in every case the Judge is bound to state in his charge how he explained the law to jury. But the charge must be recorded in such a way as would enable the High Court sitting as a Court of appeal to judge whether the facts and circumstances of the case had been properly placed before jury and also whether the law has been correctly explained.

Where there is a charge under section 20 B of the Indian Penal Code and there is a question as to the *bona fide* or otherwise on the part of the accused as also various other questions of fact, it is absolutely necessary to record the charge in such a way as will enable the High Court to ascertain whether the law has been properly explained to the jury or not in relation to the facts of the case and also whether the facts in so far as they bear upon the elements necessary to constitute the offences were properly explained to the jury or not.

Certain letters were produced on behalf of the accused and it was allowed on behalf of the defence that these letters were written by B. The letters were not proved as having been written or signed by B :

Held, that the accused in order to use these letters as evidence in their favour had to prove that the letters had been written by B. For this purpose they could rely upon expert evidence under section 45 of the Evidence Act or the opinion of a competent witness under section 47 of the Act or direct comparison of the letters with proved or admitted documents under section 73 of the Act. This comparison had to be made by the Court or by a witness called for the purpose. If the defence had succeeded in proving by other evidence that the letters had actually been written by B there was no point in making the comparison. It is only where such evidence is not available and where although the handwriting in the letters had not been proved by independent evidence to have been the handwriting of B that it is necessary to have recourse to the provisions of section 73 of the Evidence Act to see whether by comparison it can be determined whether the letters were written by B or not. The issue before the Court in a case like this is whether B had written the letters. The result of their comparison is the determination of an issue arising in the case and is quite distinct from the determination of the question of admissibility or otherwise of evidence, which latter is within the province of the Judge alone.

Held, that the Judge in not placing before the jury and in not asking them to compare with the writing in the letters the handwriting taken in Court omitted to give the accused persons an opportunity of getting an opinion of the jury on the question as to whether the letters were really written by B or not.

Although there were three accused persons and the case as against all the

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three did not stand on the same footing. The Judge did not ask the jury to consider the case as against each of the accused individually :

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A and B. were charged under sections 366 and 376 I. P. C. They both

Admissibility—(Contd.).

committed an offence under section 376. Subsequently the woman was taken by B along to different places where he alone committed rape upon her :

Held, that although both of the accused persons might have been jointly charged with both offences, if it was intended to prosecute B with regard to the offences that he was accused of having committed elsewhere there should be separate charges with regard to those offences.

That it was not necessary for the prosecution to establish that the woman was by force compelled to leave not only house but compelled to go to various places in order to sustain the charge under section 366 I. P. C. on which the accused were tried.

Under section 162 of the Code of Criminal Procedure, no statement or any record thereof whether in a police diary or otherwise or any part of such statement made by any person to a police officer in the course of an investigation under chapter XIV of the Code is admissible as evidence except as provided in the second paragraph of that section.

The statements of the accused as conduct are not admissible.

The statements of the accused of incriminating nature are inadmissible.

Allegations to the police officer during search of persons not examined in Court, that the accused was absent from home on the night of the occurrence as to kidnaping, are inadmissible.

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- On a question of rape evidence as regards the general immoral character of the woman is relevant evidence as enacted in section 155 (4) of the Evidence Act. **Keramat Mandal v. King-Emperor** ... 524

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The release of a debt for value is not a transfer of ownership and one who releases a security without consideration may be said to make a gift of it, but the transaction does not fall under chapter VII of the Transfer of Property Act, which deals only with gifts of tangible property.

A release of a debt may be made by parol but if it is in writing it should be registered, if it falls within section 17 of the Registration Act. **Mahim Chandra Dey v. Ram Dayal Dutta** ... 582

- **Statement before police officer—Criminal Procedure Code (Act V of 1898), Sec. 162—Evidence Act (I of 1872). Sec. 165—Erroneous admission, not occasioning failure of justice.**

A Judge is not entitled to put questions with regard to statements made to the police officer during the course of investigation under chapter XIV of the Code of Criminal procedure in the exercise of the power conferred upon

Admissibility—(Contd.).

him by section 165 of the Evidence Act in order to show that the witnesses had made contradictory statements to the police officer and before the Court. To use the statements for this purpose is to contravene the provisions of section 162 of the Code of Criminal Procedure.

The power conferred on a Judge under section 165 of the Evidence Act, can not be exercised for the purpose of introducing evidence in contravention of the law.

Admitting statement of a witness before the police officer regarding an unimportant matter, having some remote bearing on the question in issue and being contradictory, which not being at all vital, though erroneous but not occasioning failure of justice, is no ground for reversal of the verdict of the jury.

In introducing evidence in a trial with the aid of a jury, a Judge should be very careful in order to avoid miscarriage of justice. **Keramat Mandal**

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• The Privy Council will entertain appeals in compensation cases under the land Acquisition Act only on questions of principle, where there has been errors in law including errors in appreciating or applying the rules of evidence or the judicial methods of weighing evidence, and not upon questions of value, which latter are, in matters both of fact and law, the proper subject of appeal to the Courts in India, possessing specific local knowledge and experience; and the Privy Council will not review the decree of an Indian appellate Court merely upon question of value.	
The value to be placed at a given moment on a plot of land, which is not in the market or the subject of bargain and sale, but owes a large part of any value it possesses to the prospective results of development work to be undertaken thereafter at an uncertain time and at an estimated cost, is a question of fact. Nowroji Rustomji Wadia v. Government of Bombay ...	143
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Any question on which the parties join issue is a dispute within the meaning of paragraph 1, schedule II of the Code of Civil Procedure.	
Order 21 of the Code of Civil Procedure relating to execution of decree is self-contained and exhaustive as to the special subject with which it deals.	
A proceedings under section 47 of the Code of Civil Procedure distinct from a suit, and comes into being after the termination of the suit and in course of execution of the decree which concludes the suit.	
Paragraphs 15 and 16 second schedule to the Code of Civil Procedure, depend from their operation on a valid reference under paragraph 1. A reference to arbitration by the executing Court being without jurisdiction, should be totally ignored.	
Parties by consent cannot confer jurisdiction where it does not exist.	
The appellant applied for execution of money decree. The respondent contended that the decree had been fully satisfied out of Court and that the appellant did not fraudulently certify payment in Court. The Court decided to investigate the allegation of fraud. After several witnesses were examined, the parties filed an application referring the dispute about	

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Held, that an appeal to the lower appellate Court and a second appeal to the High Court lay, as the reference to arbitration being without jurisdiction the award was invalid in law and as the question that was left for consideration was one relating to satisfaction and discharge of the decree under section 47 of the Code of Civil Procedure.

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Assignment—(Contd.).

of a debt or other chose in action in equity, no particular form is necessary.

An assignment of a chose in action must be made in writing under the Indian law, signed by either the transferor or his duly authorised agent but no particular form of words is necessary provided that the words are sufficiently indicative of the transferor's intention to assign the chose in action. All that is necessary "is that the debtor should be given to understand that the debt has been made over by the creditor to some third person."

An order for payment of money is not the same thing as an assignment of the debt but a direction in writing to pay the amount due on an instrument endorsed on such instrument by the payee thereof, coupled with the delivery of the instrument so endorsed to the person to whom payment is directed, is a valid assignment within the meaning of section 130 of the Transfer of property Act.

The test is whether or not the right of the seller of the goods to the price of the same has been transferred to a third party by an effectual assignment that the assignee becomes entitled as of right to the payment.

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Benami—Hindu Law—Purchase of property by husband in name of wife—Ante-nuptial agreement, or benami transaction—Burden of proof.

A purchase by an Indian husband of property in India in the name of his wife, unless otherwise explained, is presumed to be a *benami* transaction, by which the beneficial interest in the property is in the husband, and the ostensible title in the wife.

The rule of English law, that such a purchase is assumed to be for the advancement of the wife, does not apply in India.

The burden of proof is on the person who alleges that the property was purchased in pursuance of an antenuptial agreement.

It would be unwise of a Judge to act in a disputed Indian case upon oral evidence that there had been an antenuptial agreement, which would in effect be marriage settlement, unless there was contemporaneous written evidence to corroborate the oral evidence. **Sura Lakshmiah Chetty v. Kothandarama Pillai** ... 8

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money on the death of the widow, the depositor, under the rule that in	
the case of female depositors withdrawing money from Post Office savings	

Certificate—(Contd.).

Bank by their authorised agents under rule 18, the agent must sign a certificate on the application for withdrawal to the effect "certified that the depositor is on this day alive and sane", is not a certificate prescribed by Government Savings Bank Act or statutory rules made thereunder and this certificate is not a Certificate within the meaning of section 197 I. P. C.

The statutory rules under the Government Savings Bank Act as to payment only apply in the case of payment of deposits to minors or guardians, of deposits belonging to lunatics or deposits by or on behalf of married woman but not to a widow.

Per Suhrawardy J. The word "certificate" occurring in section 197 I. P. C. contemplates a certificate which is required by law to be given or signed for the purpose of being used in evidence in the course of administration of justice.

The prosecution should not proceed when it was found by the Courts below that the complainant had no interest in the money which was withdrawn by the accused, who was entitled to it as heir of the deceased.

Dubitante : Section 197 I. P. C. if applicable to certificates contemplated by note 2 to section 25 of the general rules and orders framed under Post Office Savings Bank Act. **Birendra Nath Chatterji v. Umananda Mukherj** ... 557

— given by accused, entitled to money on the death of the depositor, that the depositor was alive and sane—Post office Savings Bank Act and rules made thereunder—Penal Code, Sec. 197 ; *See* Certificate. ... 557

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— if extinguished—Durputni—Transfer by durputnidar—Putnidar accepting rent from transferee—Charge created for due payment of durputni rent—Rule against perpetuity—Present interest.

Under the terms of the Kabuliyat executed by durputnidars, a charge on certain immovable properties was created for all times to come for the due payment of the durputni rent and the performance of other obligations arising under the Kabuliyat. There was nothing in the Kabuliyat which indicated that the security would be extinguished on the lessee's liability to pay the rent ceasing with the transfer. The durputnidar transferred his tenure and the putnidar accepted rent from the transferee after the transfer :

Held, that the durputnidar by merely transferring the durputni could not get rid of the charge created by him under the Kabuliyat and that the mere acceptance of rent by the putnidar from the transferee did not extinguish the same, though the relationship of landlord and his lessee the permanent tenure-holder ceased on the latter transferring the whole of his tenure.

Charge—(Contd.).

That the security of this description which was to last for all times to come was not repugnant to the rule against perpetuities.

The rule against perpetuity affects only the creation of a future interest in property and the restricting of transfer of property by tying it up. It has no application to the case of a charge where a present interest is created and there is no transfer of an interest in property, but the property is merely made security for the payment of money. **Kanai Lal Ghose v.**

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A Sessions Judge has jurisdiction to try a case which has been committed for trial to him, and if the trial is legally held an irregularity in the commitment will not vitiate the proceedings in the sessions Court.	
When a person had been put on his trial and pleaded to the charge, the commitment cannot be quashed.	
It is too late to object to the commitment after the accused has pleaded to the charge before the Sessions Court.	
<i>Quare</i> : Whether the word 'complainant' in Section 208 of the Code of Criminal Procedure applies to the person who laid the first information.	
The commitment proceedings were commenced against four of the accused other than Basir and after ten prosecution witnesses were examined, the Magistrate directed that warrant should issue against Basir. On the day he was produced before the Court, three prosecution witnesses were examined in the presence of all the accused. Subsequently two more prosecution witnesses were examined in the presence of all the accused and the charge was framed. Afterwards the investigating police officer and the Sub-Deputy Magistrate who recorded the dying declaration were examined.	
<i>Held</i> , that there was nothing in the method in which the commitment proceedings were held against Basir which would vitiate the trial. Such procedure was however, disapproved. Kasem Molla v. King-Emperor ...	
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In a proceeding under section 427 I. P. C, both parties filed a petition of Compromise agreeing to be bound by the decision of arbitrators named therein and asked for adjournment for settlement of their dispute. The arbitrators made an award, which was objected to by the opposite party. On application to record an acquittal under section 345 of the Code of Criminal Procedure, the Magistrate held that the case had not been com- pounded and that the trial should proceed :	
<i>Held.</i> that the agreement to refer the case to arbitration was not a final settlement of the dispute which the Court was bound to accept.	
That it was not the intention of the parties to treat the reference to arbitra- tion as taking the case out of the jurisdiction of the criminal Court.	
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The zemindar holding under the Permanent Settlement, has a right from time to time to raise the rent of all rent paying lands within his zemindary according to the current rate unless he is precluded from the exercise of that right by a contract binding on him or by the law in force.

No express word is needed in a document evidencing a contract to fix the rent in perpetuity.

The lease being found ambiguous in the present case, the rule how the parties understood it, is applied.

It is not proper that a contract in one case should be interpreted in the view taken with regard to another contract which is differently worded and

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Contract,—(Contd.).

under consideration in another case. **Hara Mohan Banikya**

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Court-fee—Stamp—*Court-Fees Act* (VIII of 1870), Sch. II. Art. 6—Stamp

Act (II of 1809), Sch. I. Arts. 15, 40, 57—Security bond by next friend

of minor—Decree, execution of—*Civil Procedure Code* (Act V of 1908),

O. 32 R. 6 (2).

A security bond executed in pursuance of an order of the Court passed

under order 32 rule 6 sub-rule (2) or any other rule or section of the

Code of Civil Procedure, shall bear a court-fee stamp as required by

article 6 schedule II of the Court-Fees Act; they will also be chargeable

under the Stamp Act, if they are of the kind described in article 40 or

article 57, schedule I of the Act, but will not be chargeable under the

Stamp Act if they fall under the residuary article 15, schedule I of the

Act. Reference under Section 113 read with order XLVI R. 1

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Court-Fees Act, Sch. II. Art. 6—Security bond by next friend of minor,

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Costs—Discretion—Appellate Court.

The Court which tries a suit has full power to determine by whom the costs

are to be paid. The appellate Court has no authority to interfere with

such discretion. **Rakhal Chandra Mondal v. Gour Gopal Dutta** ... 137

Creditor of Hindu widow—Enquiries, which he can make; *See* Hindu

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Criminal Procedure Code (Act V of 1898), Secs. 107, 145, sub-section (2)—Dispute regarding performance of puja.	
A dispute regarding performance of Puja of an Idol does not come under the provisions of section 145 of the Code of Criminal Procedure.	
Right to go upon a temple and to perform Puja and to take a portion of the offerings made to an Idol is not a right of user of any land as explained in section 145 sub-section (2) of the Code of Criminal Procedure.	
If there is such a dispute between the parties leading to a breach of the peace, proceedings may be drawn up under section 107 of the Code of Criminal Procedure. Surendra Nath Banerjee v. Shoshi Bhusan Sarkar	
—, Sec. 145 Sub-Sec. (2)—'Right of user'—Right to go upon a temple and to perform Puja; <i>See</i> Criminal Procedure Code Secs. 107, 145	127
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—, Sec. 288—Deposition of witnesses before committing Magistrate, a substantive evidence; <i>See</i> Evidence	111
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Cross cases—Trial.	

As regards trial of cross cases, each case has to be decided according to its requirements.

It is not fair to force a person in the position of an accused to throw himself open to cross-examination by the other side.

A trial of cross cases of rioting was fixed for hearing on certain date, when some witnesses were examined in the case against the petitioner and the case in which the petitioner was the complainant was adjourned to a certain date. On the adjourned date, the Magistrate took up the case against the petitioner and also wanted to try the case in which the petitioner was the complainant. The petitioner prayed that the trial of his case might be adjourned till the disposal of the case against him.

Held, that for the ends of justice, the case against the petitioner should be disposed of first and then the petitioner's case, if he so wished, be taken up. **Makhan Mapa v. Mohindra Nath Bose**

Cross-examination—Previous statement of witness—Suggestion that another statement made, which is incorrect—Proper course for Judge ; *See* Abduction

Custom, existence of, proved—Burden of proof ; *See* Impartible estate
 —, immemorial, existence of—Presumption—Evidence showing exercise of a right in accordance with an alleged custom ; *See* Impartible estate

Cross-examining one's own witness, result of ; *See* Abduction
Dacoity—Misdirection—Penal Code (Act XLV of 1860), Sec. 391—Confession.

The principal evidence against the appellant was that of an approver. This evidence was corroborated by evidence as to the accused being seen together at different times and places before and after the dacoity and also as to other circumstances. The learned Sessions Judge pointed out in his heads of charge there was no evidence besides that of the approver to show that the appellants actually took part in the dacoity :

Held, that so far as the evidence of the approver and the corroborative evidence given by witnesses were concerned, there was no misdirection.

Dacoity—(Contd.).

A, who did not actually take part in the dacoity, was with others, before the dacoity and went with one of the dacoits to borrow a boat, but during the dacoity he was left in the larger boat at a place some 5 or 6 miles from the place of the dacoity and told to wait for other dacoits :

Held, that A's action did not come within the definition of dacoity as given in section 391 I. P. C. as he was not present though he might have been aiding such commission or attempt.

A was examined by the committing Magistrate as a confessing prisoner. He stated that after the dacoity he was offered Rs. 100 which he took.

Held, that this statement was not a confession that he committed the dacoity and should not be taken into consideration against the other accused. **Ibrahim v King-Emperor** ... 496

Daughter's son's son, if can inherit on the ground of propinquity—Bengal School; *See* Inheritance ... 221

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Debt, assignment of—Common Law and Equity; *See* Assignment ... 43

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release of, for value, if transfer of ownership; *See* Admissibility ... 582

Decree, execution of—Decree made without jurisdiction—Executing Court, if can refuse execution.

Where the decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. **Gora Chand Halder v. Profulla Kumar Roy** ... 1

fraudulent—Decree obtained in another suit—Suit, if to be brought for setting aside decree—Evidence Act, Sec. 44; *See* Impartible estate ... 280

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Deed executed by purdanashin lady—Her knowledge of its contents—
Sufficiency of execution—Explanation prior to her execution.

Where a deed purporting to be executed by a *purdanashin* lady is in dispute, the onus is on those who seek to set it up and to establish that she was fully aware of its contents and purport either prior to its execution, or after it, under such circumstances, as show it to be her own mental act and deed, or her adoption and ratification of it with full knowledge and comprehension. And if the deed, as presented to her for execution, differs materially, by addition or omission, from the scheme and details which she had previously laid down, the discrepancy ought to be clearly pointed out to her, and its nature and effect fully described.

In the case of an illiterate *purdanashin* lady executing a deed, independent legal advice is not in itself essential. The disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it.

The extent and character of the explanation required must depend upon the circumstances. **Musammat Farid-un-Nisa v. Munshi Mukhtar Ahmad** 531

Deed of conditional mortgage or sale—Absence of any reservation of right to recover purchase money—Absence of any stipulation authorising the grantor to sue for redemption; See Mortgage by conditional sale ... 74

Defamation—Penal Code (Act XLV of 1860), Sec. 499 and Expl. II—Imputation concerning collection of persons—Police force—Offence of defamation, what constitutes—General expressions—Defamatory matter applying to class of individuals—Complaint under the orders of superior officer—Notes taken, if evidence—General words of abuse—Denial of charge—Personal conduct of collection of persons—Person defamed as member of a class, what to prove—Whether words defamatory or not, a question of fact—Words, how to be construed—Proof.

Per Buckland, J: The charges framed in the case did not conform to the requirements of section 499 of the Indian Penal Code.

Per Newbould, J: That the words set out in the first charge were defamatory.

Per B. B. Ghose, J: A charge of defamation fails on the ground that it refers to the personal conduct only of a collection of persons as such.

Per Newbould and B. B. Ghose JJ: Though the whole police force at Char Manair were attacked by the petitioner, that was not sufficient to support a conviction on the second charge as framed.

Per Buckland J: As regards the second charge though no one was referred to by name or by reference to his office in the imputations charged, the nature of the imputations was indicative of the fact that an individual might be meant.

That the imputations in the charges were general expressions assuming that they concerned the complainant.

Defamation—(Contd.).

That the confusion of ideas which these charges disclosed made it impossible for a proper trial to be held.

Explanation 2 of section 499 Indian Penal Code includes a company or an association or collection of persons as such within the word "person" as used in the definition, so that the latter should not be limited to individuals.

In a case in which the Explanation is properly called into use the identity of the company or association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning them as such with the intention of harming their reputation so that thereby they are defamed. An imputation concerning a company or association of persons as such, and the last two words of Explanation are most material to its correct application, cannot by virtue of this Explanation justify a charge of defaming as individual, and a charge cannot combine the Explanation with the definition for such a purpose.

The offence of defamation consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it.

An individual is as much defamed by words apparently only of more general application as by words referring to him by name.

Where a defamatory matter appears only to apply to a class of individuals, if the description in such matters are capable of being, by innuendo, shown to be directly applicable to any one individual of that class, an action may be maintained.

Per B. B. Ghose, J.: If the complainant has been defamed, it is of no consequence that he complained under the orders of his superior officer in order to clear his character.

An accused in a prosecution under section 500 Indian Penal Code is entitled to prove the notes taken by him of the statements made by other persons regarding the subject matter as evidence of his good faith and they are relevant on the question, although the person who made the statements were not examined.

The words complained of as constituting defamation must be set out in the charge and proved before the accused can be convicted. When there is a denial, the evidence in support of the prosecution must be scrutinised.

The words "the British Government themselves and the superior officers including from the District Magistrate down to the Daroga and Chowkidars were all beasts etc." are too wide to admit of the construction that any particular police officer was defamed.

The words "collection of persons as such" in Explanation II of section 499 Indian Penal Code mean that a collection of persons as such may be collectively defamed in the same manner as a 'company'. The general principles on which a company may be said to have been defamed would therefore apply equally to the case where it is alleged that a "collection of persons as such" has been defamed.

Defamation—(Contd.).

If a person complains that he has been defamed as a member of a class must satisfy the Court that the imputation is against him personally and he is the person aimed at before he can maintain a prosecution for defamation.

The question whether the words are defamatory or not must be decided by the Judge as a question of fact, and in deciding this question the following principle should be taken into consideration: "All circumstances which were apparent to the bystanders at the time the words were uttered should be put in evidence so as to place the jury as much as possible in the position of such bystanders, and then it is for the jury to say what meaning such words would fairly have conveyed to their minds."

A judge should not construe the words as he would a document of title according to rules of construction of deeds, specially when the words spoken have not been proved with certainty, and a judge is to decide not merely whether the words are defamatory but also whether the words refer to the complainant.

Where the defamation imputes a crime to the complainant and the accused pleads justification there must be the same strictness of proof as on a trial for such crime. **Protap Chandra Guha Roy v. Rasiduddin Khan** ... 178

Defamation, action of, if maintainable—Defamatory words appearing only to apply to a class of individuals—Description directly applicable to any one individual of that class; *See* Defamation ... 178

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A dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable and reject that which is obviously untrue though to found a criminal conviction on such appraisalment of evidence is very often unsafe. As regards a dying declaration, to accept a portion and reject the rest is entirely out of the question, there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon.	
The law of a dying declaration in India is different from the law in England. A dying declaration is relevant under the Indian Evidence Act, whether the person who made it was or was not at the time when it was made, under expectation of death, and the weight to be attached to it depends not upon the expectation of death, which is a guarantee of its truth but upon the circumstances and surroundings under which it was made and very much also upon the nature of the record that has been made of it. It is almost always a question of fact as to whether it should be relied upon or not.	
Where a statement is not the <i>ipsissima verba</i> of the person making it but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence, which it is not desirable should be open in cases in which the person has no opportunity of cross-examination. In the first place the questions may be leading questions	

Dying declaration—(Contd.).

and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being freely comprehended. In such circumstances the form of the declaration should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the examining Magistrate and how much was the production of the person making the statement.

If it appears to the jury that a dying declaration has been elicited as a result of leading questions and answers, it is a matter entirely within the province of the jury to attach little or no value to it.

The reasons given by the foreman need not necessarily be taken as constituting all the grounds which he and the other jurors may have had for their verdict.

Even when most of the reasons given by the foreman be not very convincing, the verdict will not be rejected on a reference under section 307 of Criminal Procedure Code unless it is unreasonable.

In a reference under section 307 Criminal Procedure Code, the High Court cannot refuse to accept the verdict of the jury unless it is unreasonable. **Emperor v. Premananda Dutta** 247

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— declaration and testimony of witness; *See* Dying declaration ... 247

Ejectment—Evidence Act (IX of 1872), Sec. 90—Ancient document—Presumption, when arises—Roadcess returns—Admissibility in evidence—Adverse possession of limited interest.

A document which purports to be an ancient document should be corroborated by some evidence; if this is done, presumption may be made in its favour under section 90 of the Evidence Act.

Mere production of an ancient document, unless supported by some corroborative evidence of acting under it, is not entitled to any weight. An ancient deed must be corroborated by evidence of ancient or modern corresponding enjoyment or by other equivalent or explanatory proof; it is then presumed to have constituted part of the actual transfer of property mentioned, because this is the usual course of such transactions: in brief, though absence of proof of possession does not affect its admissibility, it affects the weight to be attached to the document.

Road cess returns are admissible only against the maker.

Possession of a limited interest, for instance, the claim to an intermediate tenure, may be just as much adverse as is adverse possession of a complete interest in the property; consequently such possession of a

Ejectment—(Contd.).

limited interest may be just as much adverse for the purpose of barring suit for the determination of that limited interest as adverse possession of a complete interest in the property operates to bar a suit for the whole property. Such adverse possession of a limited interest, however though a good plea to a suit for ejectment is good only to the extent of that interest: **Swarnamoyi v. Sourindra Nath Mitra** 14

— *Land taken for shop—Lessee subsequently taking land for cultivation—Homestead—Bengal Tenancy Act (VIII of 1885), Sec. 182—Transfer of Property Act (IV of 1882), Sec. 111.*

Section 182 of the Bengal Tenancy Act is not, but the provisions of the Transfer of Property Act are, applicable to a case where land was taken not for the purpose of a homestead from which the lease was to cultivate his jote but for the purpose of a shop and is used for that purpose:

Purusottam Mahesri v. Panchanan Mazumdar 197

— Lessor, if bound by contract not to eject; *See Lease* 78

— *Misdescription—Suit for declaration of debutter properties—Person interested—Will, construction of—Gift to ancestral Idols—Shebait.*

The omission to describe the plaintiff in the cause title as shebait of the Idol is a misdescription but it may be cured by amendment without any hardship to the defendant.

The plaintiff, who is interested in the worship of a certain Idol, can alone maintain a suit for declaration that certain properties are the debutter properties of his ancestral Idol.

In the previous portion of a clause of the will, properties were given by the testator to A, his daughter-in-law with power to make gift, sale, mortgage or any permanent mayrasi makarrari settlement. The subsequent portion of the same clause was to the effect that A should transfer only with the consent of her husband H and the testator's other sons and grand sons B took out probate of the will of A by which she dedicated properties to the Idol and accepted the position that the properties were properly dedicated for Debsheba :

Held, that the restriction imposed in the will was repugnant to the gift. That the person claiming through B could not raise any question as to the validity of the disposition made under the will of A.

When the worship of an Idol has been founded, the shebaitship is vested in the founder and his heirs unless he has disposed of it otherwise or there has been some usage of course of dealing which points to a different mode of devolution.

Where the worship of an Idol has been founded, there must be some shebait of the Idol and, if any donor, subsequent to the foundation makes a grant of any property to Idol, it becomes the property of the Idol unless conditions are attached to the gift the existing shebait of the Idol would have the power to manage the property on behalf of the Idol.

Dayamayi alias Biddyutlata Debi v. Sankar Nath Mukhopadhyaya 30

Ejectment—*Notice to quit*—*Month of tenancy*—*Holding over after expiry of term of lease*—*Rent payable in four instalments.*

A notice to quit, when a tenant is holding over after the expiration of a lease for a term of years, should end with a month of the tenancy, whether the tenancy be considered from month to month or a tenancy from year to year.

The defendant held under a lease for 9 years, commencing on the 6th of Assar, 1300, agreeing to pay rent in four instalments viz. in Assar, Aswin, Pous and Chaitra every year. The tenant continued in occupation after the expiry of the lease. A notice was served in June 1909 (Jaistha 1316) calling upon him to relinquish the land by the end of Chaitra 1316. A second notice was given on the 20th Bhadro 1317 requiring him to vacate at the end of Aswin :

Held, that the notices were not valid, as they did not require him to quit on the expiry of a month of tenancy the notices should state that the tenancy would expire after the Assar. **Khosal Chandra Das v.**

Brindarani Dassya

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— *Permanent lease with condition of re-entry*—*Lease for residential purpose*—*Right to take fruit*—*Transfer of Property Act (IV of 1882), applicability of*—*Conduct of parties.*

At the time of the lease there were on the land in suit only a certain number of fruit trees and by the lease the defendants were to enjoy the land by erecting houses on it and planting, if they so liked, other fruit trees. The provision was that the lease should continue to the defendants' heirs, but there was a further provision that if at any time the lessor should require the land he should give notice to the lessees who would therefore give up the land on receipt of the value of the fruit trees &c :

Held, that as the land was let out for residential purposes with the right to take fruits from the trees on the land and to plant other fruit trees and take their fruits and not for purposes of cultivation, the lease was governed by Transfer of Property Act.

The mere fact that there was a right to plant trees or pluck the fruits of trees would not by itself convert a *potta* granted for a residential purpose into a horticultural lease carrying the same rights as an agricultural lease and so bringing it under the Bengal Tenancy Act.

That the land was given to be enjoyed from generation to generation, so long as the landlord did not require it for his own purpose.

That the rights between the parties should be determined on a construction of the lease and the conduct of the parties could not be taken into account after the lease has been entered into. **Gopal Chandra Baner-**

jee v. Bhutnath Sasmal

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— Plaintiff to prove title ; *See Inheritance*

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— *Solenama*—*Joint tenancy*—*Vidid decree*—*Execution sale*—*Title of third party, if can be pleaded.*

Ejectment—(Contd.).

The principle of joint tenancy is unknown to Hindu law, except in the case of coparcenary between the members of an undivided family.

A died leaving his widow B, grandson C and grand-daughters D and E. C died leaving his widow F. In a suit on a mortgage executed in favour of A, B as guardian of C purchased the mortgaged property in execution. Thereafter F brought a suit against her for possession of the properties left by her husband C. This suit was compromised by a *solenama*, which stipulated that certain properties, including the properties in suit, would be possessed by B during her lifetime and after her death, her grand daughters D and E would get them. Afterwards rent suits were brought by the landlord against B. Decrees in rent suit were passed after the death of B without bringing on the record the legal representatives of B. The rent decrees were then put into execution and the defendant purchased the properties and took possession through Court. D died sometimes after this and the present suits were brought by E for possession of the entire lands in dispute.

Held, that the mere fact that F's representative did not dispute the interpretation of the *solenama* could not confer any right on E to eject the purchaser.

That the purchaser was entitled in such a suit to plead the title of a third party and to show that the plaintiff was not entitled to the whole of the interest she claimed. **Gour Chandra Das v. Subashini Dasi** ...

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Under-raiyat—Heritability—Occupancy right—Local custom—**Res-Judicata.**

Where in a suit *inter parties* in ejectment it was held that the defendants had no right of occupancy, but the suit was dismissed on the ground of its being instituted before the agricultural year in which the defendants' predecessor died and on appeal the decree of dismissal was affirmed on the second ground, the appellate Court coming to no decision on the question, whether the defendants, had a right of occupancy, held that it was not *res-judicata* in a subsequent suit for ejectment.

Under ordinary circumstances, the right of an under-raiyat is not heritable.

An under-raiyat may acquire right of occupancy by custom or usage and is not then liable to be ejected under section 49 of the Bengal Tenancy Act.

The descendant of an under-raiyat, who acquired right of occupancy, if he fails to prove heritability under a local custom, is a trespasser on the land and is liable to be ejected without notice. **Iswar Sant v. Torendra Nath Kuita** ...

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Electric fans and lights, if form part of premises or building demised; *See* Standard rent, fixing of ...

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Encroached land forming part of tenancy, if to be made over to landlord after determination of tenancy; *See* Landlord, right of ...

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A certain witness stated that he had seen three women, who were sleeping in the same bari as the complaint and his wife that night, searching something at dusk :	
<i>Held</i> , that as the alleged search that evening could not be treated as part of the same transaction as the abduction at night, section 6 of the Evidence Act could not make it admissible and as the woman were neither parties to the case nor agents to any party, section 8 was inapplicable. Section 9 of the Act was also inapplicable.	
There is no harm in the Sessions Judge expressing his opinion on the fact and in fact it is his duty to do so to assist the jury provided he is careful to express his opinion in such a way as not in any way to interfere with the duties of the jury to finally decide according to their own view of the facts.	
The deposition of witnesses before the committing Magistrate when put in under section 288 of the Code of Criminal Procedure become substantive evidence and is used as such. It cannot be put in evidence as substantive evidence if for any reason it is irrelevant under the Evidence Act. Fazaruddin v. King-Emperor ...	111
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can apply—Civil Procedure Code (Act V of 1908), O. 21 R. 90.	
A person, who has obtained an attachment of property before judgment,	
cannot apply under O. 21 R 90 of the Code of Civil Procedure to set aside	
a sale of the property in execution of decree. <i>Badiar Rahaman v.</i>	
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A suit for accounts and declaration of title was instituted and subsequently referred to arbitration. The arbitrators submitted their award to which the defendants took objections. On the date of hearing, the petitioners applied for time for summoning their witnesses which was refused. Thereafter the Judge pronounced judgment in accordance with the award. Subsequently the petitioners filed an application under order 9 rule 13 of the Code of Civil Procedure for setting aside the decree. On this application the Court passed the order that it should be considered after taking the evidence of the parties. The only objection taken at that stage was that it did not disclose sufficient grounds under order 9 rule 13. A supplementary affidavit was filed by the petitioner and the Judge accepted it as curing the defect : <i>Held</i>, that the decree on the face of it <i>inter partes</i> could not be treated as <i>ex parte</i>. That, as in the present case the decree did not purport to be <i>ex parte</i>, an application under order 9 rule 13 was not maintainable. That by the order of the Judge accepting the affidavit as curing the defect his successor was not precluded from going into the propriety of the application. Rai Ramesh Chandra Guha Bahadur v. Dinesh Chandra Guha	
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Sec. 463—'Intent to defraud'—Attesting witness, signature of, effect of—Knowledge of contents of document.

The purpose with which a false document might have been prepared, is a matter of inference.

The inference that the intention was that the false document should be used in a judicial proceeding, even though such a proceeding is not in fact instituted, is a reasonable one.

The signature of an attesting witness does not fix that witness with knowledge of the contents of the document or with any liability under its terms.

"The expression 'intent to defraud' in section 463 Indian Penal Code implies conduct coupled with intention to deceive and thereby to injure; in other words 'defraud' involves two conceptions, namely, deceit and injury to the person deceived, that is, infringement of some legal right possessed by him but not necessarily deprivation of property. **Ahmed**

Ali v. King-Emperor ... 215

Fraud—Non-service of summons; *See* Impartible estate ... 280

Gang—*Penal Code (Act XLV of 1860), Sec. 400—Evidence as to previous commission of offence of previous conviction, if admissible—Approver—Corroboration—Statement of a confessing accused.*

In a trial for an offence punishable under section 400 Indian Penal Code, the evidence of previous commission of an offence or that the accused were bound down under section 110 of the Code of Criminal Procedure is admissible for the purpose of proving that offence.

It is not necessary that an approver should be corroborated as regards every simple statement that he makes.

The statement of a confessing accused may in some cases be verified by en-

quiry on the spot. **Ledu Molla v. King-Emperor** ... 501

Gift—Hindu widow handing over the possession of her estate to adopted son;

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—Releasing security without consideration; *See* Admissibility ... 582

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High Court—*Proper order—Rule issued on another ground.*

An application was made under section 476 of the Code of Criminal Procedure to the Subordinate Judge for sanction to prosecute the petitioner.

High Court—(Contd.).

He expressed the opinion that "if there be a prosecution there is no likelihood of a conviction. Such being the case I have no other alternative but to reject the application." On appeal, the District Judge ordered prosecution for offences under sections 209 and 466 I. P. C. The High Court being moved, a Rule was issued to show cause why the appeal should not be reheard by the District Judge. On the hearing of the Rule, the High Court came to the conclusion that if the prosecution was ordered there was no likelihood of conviction :

Held, that the High Court was competent to order in such Rule that the application for sanction should be rejected.

That it was competent for the High Court to make any order as it might think fit. **Bejoy Singh Hazari v. Mathuriya Debya** ...

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High Court, if can make an order as it might think proper—Rule issued on another ground ; *See* High Court ...

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— Court, when refuses to accept the verdict of jury in the reference under S. 307 of the Code of Criminal Procedure ; *See* Dying declaration ...

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Hindu law—Joint tenancy ; *See* Ejectment ...

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— Law—Mithila School—Debt contracted by ancestor alone apart from other member of the family—Member or descendant of joint family, if liable ; *See* Interest ...

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Hindu widow—Hindu widow's interest in husband's estate—Position of reversionary heirs to the estate—Adverse possession against widow—Judgment after trial in suits by or against widow—Possessory suits involving issue of validity of adoption—Limitation Act (IX of 1871), Sch. II Art. 129—Limitation Act, (XV of 1877), Sch. II Art. 141.

A Hindu widow has not power to make a gift of her husband's estate. Handing over the possession of the estate to a son to whom she has validly adopted to her deceased husband is not making a gift of the estate to him. The estate became his on his adoption if he was validly adopted. She has no power to sell or assign the estate except for necessity, so as to bind her husband's reversioners after her death.

A Hindu widow has entitled to the beneficial use and enjoyment of her husband's estate during her life. She also represents the estate in suits brought by or against her for possession of that estate or any part of it, and she and the reversionary heirs of the estate are bound by any final decree of Court, duly and properly obtained, after fair trial, and free from any collusion or fraud.

A suit brought to establish any rights, but involving necessarily the determination of the validity or invalidity of an adoption as the basis of such rights, fell under article 129 of schedule II of the Limitation Act, IX of 1871. **Vaithialinga Mudaliar v. Srirangath Anni** ...

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—Mortgage—Legal necessity—Burden of proof—Enquiries to be made by creditor—Meeting future expenses of litigation—Necessity

Hindu widow—(Contd.).

for loan brought about by wrongful act of reversioner—Creditor, when discharged of his burden of proof—Money borrowed more than necessity required—Relief.

A creditor of a Hindu widow must prove that legal necessity did exist or that he made proper and *bona fide* enquiries as to the existence of such necessity and satisfied himself by all reasonable means as to its existence. He is not bound to see to the application of the money borrowed when the money was lent for legal necessity.

The enquiries which a creditor can make is as to the existence of the necessity and also as to the debts she has incurred for a legal necessity and the amount she is in need of for meeting a necessity. It is impossible for a widow to satisfy the creditor as to the actual amount she must borrow for meeting the future expenses of litigations to which she was driven by the reversioner. In such a case the Court should be satisfied that legal necessity existed and that the sum lent was not unreasonably large. The transaction should be shown to be genuine and free from doubts of collusion between the creditor and the widow for raising larger sum than was really needed.

When the main necessity for the loan was brought about by the wrongful act of the reversioner himself, he should not be heard to complain of the high rate of interest more specially when he made no attempt to show that money was available to the widow at a lower rate of interest than was charged in the bond.

Where the existence of the necessities have been established by the creditor and the payment of consideration money is proved, the creditor has *prima facie* discharged the burden which lies on him.

In cases where it is shown that the money borrowed was more than the necessity justified, the Court should find whether the creditor knew or could have known by means of enquiries then available that the money was in excess of the necessity and if the finding is in the affirmative then the Court should allow the reversioner to recover the property on payment of the sum really justified by the necessity. If, on the other hand, the finding of the Court is in the negative, the transaction should be upheld in its entirety.

In the absence of fraud or collusion between the widow and the creditor, when the necessity for the loan is established, mere excess of the amount lent should not vitiate the validity of the transaction. When the excess is disproportionately large, that itself is evidence of collusion then the Court should not uphold the transaction.

In the present case the reversioner, the plaintiff, who drove the lady to the litigation for which the money was borrowed, must show that the sum which the lady borrowed for the necessity which really existed was in excess of the necessity or that there were means available to the creditor for making an enquiry as to the actual amount needed by the lady or that

Hindu widow—(Contd.).

the amount was excessive to his knowledge. The mere fact that the amount borrowed is to some extent larger than the sum actually needed ought not to vitiate the mortgage.

In cases where the Court finds that the necessity was inadequate for the entire loan, the reversioner should be put to terms. The decree for possession should be subject to payment of the sum paid to the widow without interest, the usufruct of the property being set off against the interest. **Taraprosad Saw v. Madhu Sudan Giri.** ...

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salion of money—Executor de son tort—Applicability to Hindus—Person setting up a title paramount—Will not proved—Legacies charged on estate, if can be enforced—Action for administration, who can bring—Defendant in wrongful possession—Defendant not sued as executor de son tort—Defendant's liability—Indian Succession Act, Sec. 266, if exhaustive—Executor, if trustee—Trust, how enforced.

With regard to impartible property of a family governed by the Mitakshara school of Hindu law, where it is not the self-acquired separate property of any member, but is the ancestral property of the family, the decision on the question what constitutes separation so far as the impartible estate is concerned, is not uniform. *Nowlukho* is an authority for the proposition that even though the general status of the family be divided, there may be jointness with respect to the impartible estate unless there is renunciation by the junior members. But in the *Telwa case* and in the *Seram-pore case* it was held that the question of the general status of the family, namely, whether there was separation in mess, worship or estate, was to be considered.

The junior members of the family by an agreement may give up their rights to the impartible estate just as they may do with respect to partible property.

In the case of impartible estates, the fact that the junior members are residing or messing separately, does not necessarily raise a presumption of separation though taken along with other facts it may do so. The question of *onus* of proof depends upon how far the facts are admitted by each side.

Although a subsequent statement may be taken as evidence of separation having taken place long before, other evidence of subsequent acts and conduct are to be taken into consideration.

Asserting rights by a junior member of the impartible estate in excess of what he has in the *khorphosh* mouzas, as setting up of permanent rights in the *khorpho h* mouzahs, by itself, will not show an intention to separate. If the deed itself recited that it was a maintenance grant, there is no repudiation of the interest of the impartible estate holder. Order 13 rule 1 of the Code of Civil Procedure does not exclude the discretion of the Court to receive any documentary evidence in the possession of party on which he intends to rely, at any subsequent stage. An appellate Court should not interfere with this discretion unless it has been capriciously exercised.

In an ordinary joint Mitakshara family the junior members have an interest accruing by birth in ancestral property, and such interest carries with it a right to maintenance until partition is effected. Such a right is a real right and can be enforced against a stranger. In an impartible estate, however, the junior members do not acquire an interest by birth.

Impartible estate—(Contd.).

The junior members in an impartible estate may have right to maintenance under the law. This was recognised before *Sartaj Kuari's case* but negatived in later cases, viz. *The second Pittapur case* and the *Foy. pore Case*. These cases lay down that there is no right of junior members to maintenance apart from custom and apart from special texts and personal disqualification. This view was modified in *Bajinath's Case*.

Even if the junior members have no right to maintenance under the law, they have such right under custom.

If a junior member's right to maintenance is based upon law, his receipt of maintenance shows jointness.

An impartible estate is a creature of custom and the right of junior members maintenance is also under the same custom. Custom has origin in an agreement by which the members agree that one of them (the eldest) in certain order of succession should hold the estate, the other members being entitled to maintenance.

An impartible estate is by its very nature incapable of common enjoyment or being the subject of co-ownership, and in that sense there can be no jointness in estate. But the receipt of maintenance (whether under the law or under custom) may, in the absence of other circumstances, be the only mode in which jointness in estate (in a limited sense and in so far as is consistent with an impartible estate) be kept up in an impartible estate. A mere receipt of maintenance in all circumstances is not sufficient to constitute jointness; it indicates jointness.

When a grant for maintenance is made to a junior member of an impartible estate, it is *prima facie* intention that the gift should be for life.

If a grant for maintenance to a junior member of an impartible estate is perpetual, it is in excess of his right and may indicate an intention to separate the junior member from the family.

A *khorphosh* grant may be made to a junior member, in recognition of his right to maintenance (whether under the law or under custom) as a member of the family, and in such a case there is not a complete separation. In all cases of *khorphosh* grants, there is always the possibility of a reversion to the parent estate on the extinction of heirs of the grantee.

Ordinarily the execution of a will by a competent testator raises the presumption that he knew and approved of the contents of the will, if nothing appears to the contrary.

A will not proved in the Probate Court may be cited in evidence for purpose of showing the intention of the testator with regard to his estate.

Section 187 of the Indian Succession Act, which is incorporated in the Hindu Will Act, does not debar the use of a will in evidence for a purpose other than the establishment of a right as executor or legatee.

A statement made by deceased as to person who will be his successor in

Impartible estate—(Contd.).

case of his not having a son, is inadmissible in evidence under section 32 of the Evidence Act.

The rule of survivorship applied to succession in ancestral impartible estates.

Mere non-service of summons in ordinary cases is not sufficient to constitute fraud.

A party to a suit can, under section 44 of the Evidence Act, show that a decree obtained by opposite party against him in another suit was obtained by fraud, and it is not necessary for him to bring an independent suit for setting it aside.

Evidence showing exercise of a right in accordance with an alleged custom as far back as living testimony can go, raises the presumption though only a rebuttable one, as to the immemorial existence of the custom, and, if the existence of the custom has been proved for a long period, the *onus* lies on the person seeking to disprove the custom to demonstrate its impossibility.

Income of an impartible estate or properties acquired therewith, is the absolute property of the owner of an impartible estate.

In the case of an impartible estate, the holder is the owner both of the impartible estate as well as its income. If the owner does not dispose of the estate but converts a portion of it into money, it is no longer a part of the impartible estate. The money to which it is converted is freed from the rights of the junior members whatever they may be, and become the absolute property of the holder of the estate, unless the money or property is incorporated with estate.

Monies received on account of mining leases or royalties from mines or compensation under the Land Acquisition Act at the best stand on the same footing as sale, and junior members cannot have any right to any of them.

The mere fact that rents are credited to the account books of the estate or treated as part of the income of the estate is not sufficient to affect the property with character of impartibility.

There can be no incorporation of movable properties with an impartible estate. In order that there may be incorporation, the property to be incorporated must be of the same nature as the immovable property.

Incorporation involves altering the ordinary course of succession.

The produce of an impartible estate does not necessarily belong to and form an accretion to the original property. Rent which has become due during the lifetime of the holder of an impartible estate is produce of the impartible estate whether the produce has actually come into the hands of the owner or not.

The interest of the holder of an impartible estate is not analogous to that of a Hindu widow. The holder has absolute power of disposal over the estate,

Impartible estate—(Contd.).

Where the values of movable properties were disputed by the defendant in the written statement and an issue was raised on the point, the Court should not accept the values given in the plaint without any evidence, and if it accepted the values as given in the plaint and the defendant raises a question in appeal, the appellate Court can order that proper procedure should be followed.

'Successors' does not necessarily mean 'Successor by survivorship.'

Where the suit is for recovery of impartible estate as well as other properties movable and immovable, of which the defendant is said to have been in wrongful possession, there is only one cause of action, namely, the withholding of all those parties by the defendant and will include the monies realised subsequent to the death of the last holder of the impartible estate and prior to the institution of the suit.

If one who is neither executor nor administrator intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in law an executor of his own wrong or more usually an executor *de son tort*. A very slight circumstance of intermeddling with the goods of the deceased will make a person executor *de son tort*.

The doctrine of executor of his own wrong in the law of wills introduced in sections 265 and 266 of the Indian Succession Act, is applicable to cases not governed by that Act on general principles of equity and good conscience even though similar provisions have not been introduced into the Probate and Administration Act.

If, however, a person set up in himself a colourable title to the goods of the deceased though he may not be able to make out his title completely, he shall not be deemed an executor *de son tort*, but the claim must be *bona fide*; so also if he takes the goods of the deceased by mistake supposing them to be his own, this will not make him executor of his own wrong.

If a person claims a title not derived from the testator but a paramount title he does not make himself liable as an executor *de son tort*.

Unless a will is proved in the Probate Court, the legacies cannot be enforced against the estate, even though they are charged upon it.

An action for administration, which means that the legacies and debts have to be paid off, may be brought by the next of kin.

Where the plaintiffs alleged in the plaint that there was no will but that the defendant, was in possession and that his possession was wrongful and the defendant, on the other hand, said that there was a will, and if he had in fact intermeddled with the estate:

Held, that it was sufficient to hold the defendant liable as executor *de son tort* although he was not sued as executor *de son tort*.

Section 266 of the Indian Succession Act is not exhaustive; it deals with

Impartible estate—(Contd.).

some of the liabilities and does not deal with all the rights and liabilities of an executor *de son tort*.

A person who takes possession of or intermeddles with the estate of a deceased person without being appointed an executor is an executor *de son tort*, and is liable both under the Hindu and English law.

An executor though not a trustee for specific purpose (under section 10 of the Limitation Act) is a trustee with a fiduciary character even as regards the next of kin.

Trusts are enforced not only against persons who rightfully are possessed of the trust property as trustees, but also against all persons who came into possession of the property bound by the trust with notice of the trust, and whoever so comes into possession is considered as bound with respect to that special property to the execution of the trust **Rani Prayag**

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Inheritance—Bengal School—Daughter's son's son—Spiritual benefit—Nearness of Kin—Ejectment, suit for—Title to be proved.

Unless a person is in a position to confer spiritual benefit on the owner of the property whose property he claims, he is not and cannot be an heir of such a person and cannot therefore claim to inherit such property.

Daughter's son's son is not an heir according to Bengal school. Even if there be no one alive who can confer spiritual benefit he cannot inherit on the ground of his propinquity to the original owner of the property.

A person suing in ejectment must establish his title. **Nepaldas Mukherjee v. Probhas Chandra Mukherjee** ... 221

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Interest—Mortgage—Hindu Law—Mithila School—Mortgage of joint family property—Compound interest—Transfer of Property Act (IV of 1882), secs. 86 and 90—Sonthal Parganas Regulation (III of 1872 as amended by Regulation V of 1895), secs. 5 and 6—Sonthal Parganas Settlement (Amendment) Regulation (III of 1908), sec. 5—Notification re-settlement in Calcutta Gazette—Jurisdiction of Subordinate Judge—Claim for personal decree against mortgagors—Civil Procedure Code (Act V of 1908), sec. 11—Res judicata—Civil Procedure Code, Sec. 34—Interest post the date of institution of suit—Successor in office of Judge, if can alter his predecessors order—Splitting up of cause of action—Appeal to Privy Council—Suit involving a prolonged examination of numerous items of advances and loans.

In 1896, the adult members of a joint Hindu family, for themselves and the minor members thereof, executed a mortgage of family property partly in Bhagalpur and the greater part was situated in the Sonthal Parganas, to secure the repayment on or before 14th March 1908 of Rs. 3½ lakhs, principal money, and thereafter compound interest thereon at 7½ per cent with yearly rests.

In 1904 (when no settlement of the Sonthal Parganas had yet been made, or notified as required by the Sonthal Parganas Regulation, III of 1872, section 5, in the *Calcutta Gazette*) the representatives in interest of the deceased mortgagee instituted, before the Subordinate Judge, Bhagalpur, a suit upon the mortgage against the then members of the joint family and others who derived title through them, claiming a decree for sale of the mortgaged property, and foreclosure, under sections 86 and 90 of the Transfer of Property Act, and for "such other reliefs as may under the circumstances of the case be deemed proper may be granted," but not specifically praying for a personal decree. That suit was ulti-

Interest—(Contd.).

mately on appeal dismissed by the Privy Council in May 1914 on the ground of want of jurisdiction of the Bhagalpur Court in the then circumstances by virtue of the aforesaid Regulation.

Subsequently, the settlement operations of lands in the Sonthal Parganahs (including those comprised in the mortgage) having been completed and duly notified in the *Calcutta Gazette* in accordance with section 5 of the Sonthal Parganas Settlement (Amendment) Regulation, No. III of 1908, which replaced the aforesaid Regulation of 1872 the mortgagee's representatives instituted a fresh suit to enforce the mortgage in 1913 in the Court of the said Subordinate Judge, and claimed both a decree for sale and a personal decree. The mortgagors' representatives pleaded *inter alia* that the judgment of the Privy Council in the 1904 suit operated as *res judicata*, and barred a fresh action upon the same mortgage; that compound interest was illegal and that all interest already paid in compliance with the deed should be refunded; and that under the Mithila school of Hindu Law, the joint family was not liable for a debt not contracted by a common ancestor of all its members, and that a member of such family was not liable for any contracted by the ancestor jointly with another person:

Held, (i) That the Court of the Subordinate Judge has jurisdiction in the Sonthal Parganas within the meaning of section 6 of the Regulation III of 1872, as amended in 1893; (ii) the Court of the Subordinate Judge, Bhagalpur, being in 1913 a Court having jurisdiction under section 5 of the Regulation of 1908, which it was not at the time of the institution of the first suit in 1904, the judgment in the 1904 suit did not act as *res judicata* against the new suit; but in so far as the relief by a personal decree was implicitly included in the general relief claimed in the first suit, the grant of such personal decree in the second suit was barred by reason of the Civil Procedure Code, sec. 11, and explanation thereto; (iii) in exercising his jurisdiction, the Subordinate Judge was bound to conform strictly to the requirements of section 6 of the Sonthal Parganas Settlement Regulation No. III of 1872, as amended by Regulation No. V of 1893, and to disallow compound interest and all interest paid in excess of that specifically prescribed therein; (iv) it is not inconsistent with the principles of the Mithila (which for the most part is identical with the Mitakshara) school of Hindu law that a member or descendant of a joint family should be liable for a debt contracted by an ancestor alone apart from another member of the family.

The effect of section 5 of Regulation III of 1908 which replaced section 5 of Regulation III of 1872, has been to exclude for the future after that substitution the jurisdiction of the civil Courts to try cases relating to any lands in the Sonthal Parganas only during such period as that land should be under settlement the period being reckoned from the time when the land is under settlement to the time when the settlement is completed.

The allowance of interest post the date of the institution of a suit is by the

Interest—(Contd.).

section 34 of the Code of Civil Procedure within the discretion of the Court. As a rule the Privy Council does not interfere with such discretion exercised by the Court below.

The successor in office of the Judge has not the power to alter a decree made by his predecessor.

It is the policy of the Code of Civil Procedure, that parties should not have the right to split up a cause of action against defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit.

In an appeal from the decree of a High Court in a suit which involved a prolonged examination of numerous items of advances and loans and of the evidence relating to them by a High Court, those who impugn before the Privy Council the findings of fact by the High Court upon which it based its decree, must draw the attention of the Board to the material evidence which they suggest that the High Court misunderstood or failed to appreciate, and on which they contend that the Board should come to a conclusion different from that at which the High Court arrived. **Sourendra Mohan Sinha v. Hari Prasad Sinha** ...

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The President of the Tribunal has no jurisdiction under section 18 or section 24 of the Calcutta Rent Act to express his opinion as to whether the rent paid on the 1st of November, 1918, was unduly low or not, in the absence of anything to show that the Rent Controller was invited to express his opinion upon that point. Order fixing standard rent on compromise is not an order <i>in rem</i>. Section 24 of the Calcutta Rent Act lays down that where there is a decision of the controller on a particular question, the President in revising that decision may take further evidence and come to his own conclusion having the decision of the Controller before him. Under the Calcutta Rent Act, the Controller should first form his opinion whether the rent on the prescribed date was unduly low under sub-section (3) clause (d) of section 15 and then he is to exercise his discretion in fixing the standard rent ; when he does that, it is open to the President of the Tribunal to revise that order on an application made by any of the parties. Where the decision of the Rent Controller is not sought for on a particular point, It is not open to any of the parties by an application for revision to the President of the Tribunal to start a new point altogether and to have his decision. L. R. Counsell v. Sm. Sukumari Debi	
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Suit for possession brought in Munsiff's Court decreed—Mesne profits pendente lite, claim for—Amount of profits claimed or assessed exceeding Munsiff's jurisdiction—Civil Procedure Code (Act V of 1908), O. 29 R. 12—Bengal, North Western Provinces and Assam Civil Courts Act (XII of 1887), Sec. 19.—Application for ascertainment of mesne profits, if a plaint.

Held by the Full Bench (Walmsley, J. dissenting): The Munsiff after passing a decree for possession in the proper exercise of his jurisdiction and also a preliminary decree for mesne profits, has jurisdiction to make a final decree in accordance with his decision. This jurisdiction is not limited, if, as a result of the inquiry directed by him, the mesne profits are found to exceed the amount of his pecuniary jurisdiction as regards the value of the suit.

Section 19 of Bengal, North Western Provinces and Assam Civil Courts Act and section 6 of the Civil Procedure Code have reference to the value of the suit for the purpose of entertaining jurisdiction.

The application for ascertainment of mesne profits is not a plaint.

The value of a suit in which the plaintiff claims recovery of possession of immovable property and also asks for mesne profits *pendente lite* is the value of the property. The plaintiff is not required to value even approximately the amount of mesne profits *pendente lite*.

When the value of the property is one thousand rupees or less, the plaintiff must bring his suit in the Munsiff's Court under the provisions of section 15 of the Code of Civil Procedure, and he cannot resort to a Court of higher grade with reference to any prospective mesne profits.

The forum of appeal is determined with reference to the value of the suit, and not the amount decreed.

Per Walmsley, J: The Munsiff's jurisdiction in dealing with an application for ascertainment of mesne profits *pendente lite* remains subject to the pecuniary limitations contained in section 19 of the Bengal, North Western Provinces and Assam Civil Courts Act.

The mesne profits are not to be considered in determining the value of the suit for possession and deciding whether it has been brought before the right Court. When the mesne profits are ascertained, the Munsiff has jurisdiction to pass a decree to the full extent of his pecuniary limits for mesne profits *pendente lite* over and above the decree already passed for the property and mesne profits prior to institution.

The plaintiff after winning a decree for the land in the Munsiff's Court must bring a fresh suit for the ascertainment of mesne profits on the ground that the amount exceeds pecuniary jurisdiction of the Munsiff, which is entirely independent of the first suit, and that suit is liable to the ordinary law of limitation. **Bidyadhar Bachar v. Manindra Nath Das** 49

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Landlord, right of — <i>Tenant encroaching on land.</i> If a tenant had encroached upon any land and made it a part of his tenancy he is bound to give that up to his landlord at the determination of his tenancy. Indu Bhusan Bose. v. Atul Chandra Biswas ...	276
Landlord and tenant — <i>Dispossession by landlord—Rent, if and when assessed—Presumption of payment—Second appeal.</i> Where a tenant being in possession of the whole demised area, was dispossessed from a portion thereof by his landlord, the latter is not entitled to sue for rent in respect of the whole or any portion thereof. In the absence of any finding that the rent had been paid at the rate reserved in the <i>kabuliat</i> since the date of dispossession in the year 1902, no presumption can be made in second appeal that the rent had always been paid at this rate from the year 1902. Where a tenant has taken possession of a portion of the demised land but never has been put in possession of the whole, the Court fixes a rate of rent for the area taken possession of to be paid by the tenant on the ground that although he has contracted for the whole area he has elected to go into possession of a portion only of the area. Where under circumstances over which the landlord had no control the tenant has not been given possession of the whole area, the Court decrees the rent in proportion to the area of the land of which the tenant has obtained possession. Suresh Chandra Samaddar v. Mathura Nath Gain ...	66
Land Registration Act , Sec. 78—Assignee of rent—Assignor not registered ; <i>See</i> Suit for rent ...	134
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— of dying declaration in India and in England ; <i>See</i> Dying declaration ...	247

Lease—Construction—Erroneous admission by pleader.

A deed purported to be an agreement for letting out *Basa Bari* and a tin *Ghar* ran follows: "You having come to me and Rs. 150 only having been fixed as the annual jama of the said *Basa Bari* and the tin *Ghar* I let out the same to you for carrying on your trade and commerce therein". Then followed a clause as to the way in which the expenses for repairs would be met. It then said "after the accounts have been made and the amount of money expended therefor totalled, there will be a fresh deed. On repayment of the debt the lessor will be able to make any new settlement of the land according to her wish." In the third paragraph there were certain other condition such as the maintenance of boundaries, payment of damages for injuries to the *Ghar* not caused by accident, keeping the house in repair. If the lessor did not make the repair, the lessee would make it and deduct the expenses thereof from the rent reserved :

Held, that the document was a lease for a term of years and required to be stamped and registered.

An erroneous admission by a pleader on a point of law is of no effect and does not preclude a party from claiming his legal rights in the appellate Court. **Ram Chandra Agarwala v. Syameswari Dasya** ...

—Homestead land—'Raiyat'—'Kaimi maurasi raiyati'—Estoppel.—*Bengal Tenancy Act (VIII of 1885), Sec. 49.*

A lessor is bound by the contract by which he agreed not to eject the lessee.

The word 'raiya' does not necessarily mean an agricultural tenant. It is often used in the mofusil in its wider sense as meaning a tenant in general.

A lessee of a piece of homestead land is ordinarily a tenant and not a raiyat. The expression 'Kaimi maurasi raiyati' in a lease of homestead land means a permanent heritable tenancy of homestead land.

A sub-lease held under a permanent tenant of a homestead land, does not come under section 49 of the Bengal Tenancy Act.

Even assuming that the lessor in the present case was a 'kaimi maurasi raiyati' he was estopped from showing that he was a raiyat with right of occupancy or that the lessee was an under-raiyat and that the agreement not to eject was invalid **Bidhumukhi v. Gobinda Chandra Pal** ...

—, ambiguous—Construction—Acting of parties; *See Contract* ...

—, if for horticultural purpose—Lease for residential purpose—Right to plant trees or pluck fruits of trees; *See Ejectment* ...

— for a term of years—Document, if to be stamped and registered; *See*

Lease ...

Legacies when enforceable; *See Impartible estate* ...

Legal necessity—Future expenses of litigation; *See Hindu widow* ...

Lessee, if can recover—Assignment of rent by lessor to lessee—Name of assignor not registered—Land Registration Act, Sec. 78, if bar; *See*

Suit for rent ...

— of homestead land, if raiyat; *See Lease* ...

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———, if bound by contract not to eject lessee ; <i>See</i> Lease ...	76
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——— of tenant—Joint and several—Lands let out to two or more tenants ; <i>See</i> Suit, maintainability of ...	232
Limitation— <i>Limitation Act (IX of 1908), Sch. I. Art. 11A.—Decree-holder auction-purchaser—Application under O. 21 R. 100 Civil Procedure Code (Act V. of 1908), granted—O 21 R. 103 C. P. C., scope of—Suit for ejectment—Causes of action—Merger—Bengal Tenancy Act (VIII of 1885), Sec. 22.</i>	
The suit contemplated by order 21 rule 103 of the Code of Civil Procedure is a suit by a person who is kept out of possession of the property purchased in execution of the decree and claims possession under his auction purchase. It does not concern itself with any other cause of action which such person apart from his character as auction-purchaser may have against the defendant. In a suit under O. 21 R. 103, the cause of action is an adverse decision passed under rule 101.	
The plaintiffs obtained a rent decree against the heirs of their tenant and in execution of that decree purchased and took possession of the holding in suit. The defendants claiming to possess the property on their own account and not on behalf of the judgment-debtors, made an application under order 21 rule 100 of the Code of Civil Procedure for restoration of possession. On the 26th June 1917 order was passed in their favour under order 21 rule 101. In May, 1920, the plaintiffs instituted the present suits for ejectment on the ground that the defendants being purchasers of a non-transferable occupancy holding were trespassers :	
<i>Held</i> , that the suits were not barred under article 11A, schedule I of the Limitation Act.	
That order 21 rule 103 of the Code of Civil Procedure had no application, as the suits were based not on the adverse decisions against the plaintiffs in proceedings under order 21 rule 100 of the Code, but on the transfer by the tenants of the non-transferable occupancy holding.	
That the contention that under section 22 of the Bengal Tenancy Act as the tenancy got merged in the landlord's superior interest, their only remedy was to proceed as auction-purchaser under order 21 rule 103 of the Code of Civil Procedure their character as landlords having been lost by virtue of the purchase of the holding, was not correct. Ambika Charan Bakta v. Ram Prosad Chatterjee ...	578
Limitation— <i>Limitation Act (IX of 1908), Sch. I Arts. 36, 40—Suit for compensation for deterioration of oranges—Detention in Police Station.</i>	

Limitation—(Contd.).

Article 36 and not article 49, schedule I of the Limitation Act is applicable to a suit for compensation for deterioration of oranges owing to detention at the Police Station. Ananda Chandra Kacharu v. Baroda Kanto Dey	203
Limitation Act , Sch. I Art 12—Revenue Sale Law, Sec. 33—Sale being nullity, if to be set aside; <i>See</i> Sale for arrears.	69
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—, necessity of, established—Excess of amount lent—Transaction, validity of; <i>See</i> Hindu widow.	269
Lower owner , liability of—Blocking of artificial watercourse by lower land owner—Consequent flooding and damage to owner of land higher up the canal; <i>See</i> Nuisance	156
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—, right to—Junior members in impartible estate; <i>See</i> Impartible estate	280
—, right to—Ordinary joint Mitakshara family—Right, if can be enforced against stranger; <i>See</i> Impartible estate	280
—, grant to a junior member of impartible estate, nature of; <i>See</i> Impartible estate	280
—, to junior member of impartible estate, perpetual grant for— • Intention to separate; <i>See</i> Impartible estate	280

Mandatory provision—Disregard, effect of.

Failure to comply with the rule contained in section 539B of the Code of Criminal Procedure in connection with proceedings under section 145 of the Code is an irregularity, and does not vitiate the proceedings in the absence of prejudice.

Per B. B. Ghose : There is no universal rule that disobedience of a mandatory provision in a statute has the consequence of nullification of all proceedings irrespective of any question of prejudice. Whether a mandatory provision is imperative or only directory depends upon a consideration of various circumstances. **W. R. T. Forbes v. Mahammad Ali Haidar Khan**

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Mandatory provision, disobedience of, effect of; <i>See</i> Mandatory provision ...	131
— provision, if imperative or directory; <i>See</i> Mandatory provision ...	131
• Mesne profits—Suit for possession and mesne profits prior to suit valued at Rs. 4000—Suit after ascertainment found to be more than Rs. 5000; <i>See</i> Appeal, forum of ...	267
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Misdirection — <i>Criminal Procedure Code (Act V. of 1898 as amended by Act XVIII of 1923)</i> ; <i>Sec. 288</i> — <i>Duly recorded in presence of accused under Chap. XVIII</i> — <i>Evidence recorded not for purposes of commitment</i> — <i>Effect of admitting evidence recorded by committing Magistrate—Evidence of witnesses, if can be believed in part.</i>	

The amendment of section 288 of the Code of Criminal Procedure by substituting the words 'duly recorded in the presence of the accused under Chapter XVIII' for the words 'duly taken in the presence of the accused before the committing Magistrate' is intended to cover cases where evidence may be recorded by the committing Magistrate but not for the purpose of commitment, as under section 219.

The evidence recorded by the committing Magistrate if admitted under section 288 of the Code of Criminal Procedure is to be treated as evidence for all purposes even as the basis of finding or verdict and on a par with any other evidence before the Sessions Court or as a substantive evidence on which the verdict of the jury or the judgment of the Judge can be based.

It is dangerous to lay down as a general rule of law that in this country it is not proper to believe the evidence of a certain witness in part.

The conviction of the accused under section 324 Indian Penal Code rested upon the evidence of three persons who spoke of the occurrence before the committing Magistrate but who in the Sessions Court declared that they knew nothing about it. The basis of the verdict of the jury was the evidence of those witnesses recorded by the committing Magistrate and admitted by the Judge under section 288 Criminal Procedure Code :

Held, that the conviction based on the evidence admitted under section 288 was not wrong.

Where the Judge in his charge to the jury said : " It seems clear to me that these persons have decided to go as far as they possibly can towards altering their evidence in such a way as shall secure the acquittal of the two men here on trial. It is for you to say whether you feel convinc-

Misdirection—(Contd.).

ed as to the three Magisterial depositions to an extent which would warrant you as prudent men in acting upon them :”

Held, that as the Judge did not direct the jury to look upon the evidence of witnesses who had retracted their statement before the committing Magistrate as suspicious and regard them with great caution, the charge was vitiated. **Abdul Gani Bhuya v. King-Emperor** ...

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—Evidence of approver and corroborative evidence; *See* Dacoity ...

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—Judge in omitting to place before the jury and to ask them to compare with the handwriting in the letters the handwriting in Court; *See* Abduction ...

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—Possession of stolen goods by accused—Explanation as to possession—Presumption.

In a case where the evidence of guilt of the accused rests upon discovery of stolen property from his possession and which is tried by jury, the proper course is to direct that the jury are entitled to take into consideration the explanation offered by the accused of their possession. It is not necessary that such claim by the accused must be proved. If he states the circumstances under which he obtained it, the jury may accept it, and in that case it will be their duty to acquit the accused.

Where a Judge in his charge to the jury insists that, if the prosecution succeeds in proving possession by the accused of recently stolen goods, it is the duty of the accused to prove his innocence and emphasizes it by explaining that mere allegation is not proof and that the presumption raised under the law cannot be rebutted by mere denial :

Held, that the explanation of the law is not correct and amounts to a misdirection which vitiates the charge. **Kabatulla v. King-Emperor** ...

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Money borrowed more than necessity justified—Decree, nature of; *See* Hindu widow ...

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—obtained by converting part of impartible estate, whose property; *See* Impartible estate ...

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—received on account of royalties—Junior members in impartible estate, right of; *See* Impartible estate ...

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Mortgage—Legal necessity—Meeting future expenses of litigation—Necessity for loan brought about by wrongful act of reversioner; *See* Hindu widow ...

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—Mortgage by purdanashin lady—Attestation—Transfer of Property Act (IV of 1882), sec. 59—Evidence Act (I of 1872), section 70.

A mortgage purporting to be executed by a purdanashin lady, and bearing

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Mortgage—(Contd.).

on it by way of attestation, the signatures of persons who were not present at her execution thereof, is not attested in the manner required by section 59 of the Transfer of Property Act and is therefore void as against her.

Section 70 of the Evidence Act applies to a document duly attested. A document is not duly and legally attested, within the meaning of section 70 of the Evidence Act if it is merely signed by persons who, though professing to witness to its execution, were in truth and in fact, not so.

Hira Bibi v. Ram Hari Lal

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—, if vitiated—Amount borrowed is to some extent larger than sum actually needed ; See Hindu widow	269
—, release of—Oral evidence, if admissible to prove discharge ; See Admissibility	582

Mortgage bond—Consideration—Contract Act (IX of 1872), section 23 Ill(h)—Agreement, effect of—Public policy—Not taking the administration of law out of the hands of Judges—Stifling criminal prosecution—Non-compoundable offence—Registration—Bond given by debtor and third party.

The first defendant, who was the servant of the plaintiff firm, misappropriated Rs. 30,000 of the firm money. The Commissioner of Police prosecuted him for the offence. On the intercession of the friends of the defendant, it was arranged that the plaintiff firm would agree to the prosecution being given up, if they received Rs. 15000 in cash and a mortgage for a sum of Rs. 5000. The firm laid all the facts before the Police and left it to the Commissioner of Police to decide whether the case should go on or not, and it was his decision that in the circumstances the charge might be withdrawn. The plaintiffs then obtained from the defendant Rs. 15000 and a mortgage bond for Rs. 5000 executed by defendant No. 1 and his brother, defendant No. 2 :

Held, that the agreement embodied in the mortgage deed was enforceable.

That the consideration for mortgage was valid and was not contrary to public policy within the meaning of section 23 of the Contract Act, as the plaintiffs did not render the criminal proceedings abortive.

That the plaintiffs did not act improperly in entering into the arrangement, as they brought the whole matter to the notice of the authorities responsible for the conduct of the prosecution and left it to them to decide whether they should proceed or not.

That both the defendants were liable under the mortgage deed.

Per Mukerji, J : The general head of public policy covers a wide range of subjects and the doctrine of public policy is one which must always be applied with caution. At the same time, the doctrine may legitimately be invoked if the real object of the agreement is to interfere with the course of justice.

Mortgage bond—(Contd.).

An agreement to stifle a prosecution is distinguishable from the lawful compounding of a compoundable offence. If the offence is not compoundable under the law, a compounding of it is illegal and opposed to public policy. If the effect of an agreement is to take the administration of the law out of the hands of the Judges and put it into the hands of a private individual to determine what is to be done in the particular case, it is opposed to public policy. On the other hand, there is nothing to prevent a creditor from taking a security by a threat of criminal proceedings, so long as there is no agreement not to prosecute.

There is a good deal of difference between the motive for the act and the consideration or object of the agreement.

Illustration (h) to section 23 of the Contract Act, though not exhaustive, but only illustrative of the section, gives only a very gross and extreme instance.

The registration of the mortgage deed by whatever means it was effected, could not affect the character of the agreement which was already complete and the registration would give effect to the document from the date of its execution. The question of validity of the document is not affected so long as the registration is not held to have been without jurisdiction.

Where a *bona fide* debt exists and where the transactions between the parties involve a civil liability as well as a criminal act, a bond given by the debtor and a third party as security for the debt is not void under section 23 of the Contract Act. **Dwijendra Nath Mallic v. Gopiram Gobindram** 90

Mortgage by conditional sale—Document, construction of—Evidence as to subsequent conduct of parties—Intrinsic evidence—Omission as to date of payment—Omission as to right to redeem.

Intrinsic evidence afforded by the terms of a document is to be taken into consideration in its construction. The Court also takes into consideration the facts which may legitimately be proved with a view to showing in what manner the language of the document was related to the existing facts and may also refer to the contrast between the value of the property and the consideration that passed in money.

Evidence relating to subsequent conduct of parties themselves as showing their intention, is inadmissible in a case where no third parties are involved or no question of fraud arises.

An omission as to the date within which the money is to be repaid, would not indicate the real character of the document and it is no indication that the deed is not one of mortgage.

The absence in a document of any reservation to the purchaser of the right to recover his purchase money or of a stipulation authorising the grantor to sue for redemption, is not always a safe criterion for the determination of the question, whether it is a deed of conditional mortgage or of sale.

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Mortgage by conditional sale—(Contd.).

On construing the document in the present case, in which the parties were Mahomedans :

Held, that inadequacy of price coupled with the mention in the deed about the need of money on the part of the vendor, and the stipulation as to return of the purchase price to the vendee and the reconveyance of the property indicated that the document was intended to be one of mortgage by conditional sale. **Mohammad Usman v. Abdul Rahaman** ...

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Notes taken by accused of statements made by other persons regarding

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Notice to quit—Tenant holding over after expiration of a lease for a term of years ; *See* Ejectment 475

Nuisance—*Artificial water course—Blocking of canal by lower land-owner—Consequent flooding and damage to owner of land higher up the canal—Liability of lower owner.*

A raised road or "bund" traversed depressed ground, through which flowed a canal, properly provided with a gap or "eye" for the flow and a bridge over the canal. The owner of land lower down the canal caused this gap or "eye" to be filled up, thus blocking up the course of the water in the canal at that spot, which water overflowed and flooded land higher up the canal course, and damaged the crops there :

Held, that the lower owner was guilty of an actionable nuisance, for which he was liable in damages to the higher owner.

It is immaterial in such cases to enquire how or by whom the waterway thus blocked up was originally formed or built, or whether it was a natural or an artificial watercourse.

Though, in the case of a natural watercourse, the various riparian owners are entitled, as an incident of their ownership, to the unimpeded flow of the water and to its reasonable enjoyments it passes in its natural course through the riparian lands, and, on the other hand, in the case of an artificial watercourse such owners' right to the water-flow rests upon either prescription or grant from or on contract with the owner of the land from which the water was artificially brought, yet a watercourse, originally artificial, may have been made under such circumstances and used in such manner that a riparian owner may have over it, apart

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Nuisance—(Contd.).

- from grant or prescription or contract, the same rights as over a natural stream.

The law in lower Burma as to the flow of, and flooding by fresh water rivers and watercourses, or trespasses on the bed or soil of such rivers, is the same as in England. **Maung Bya v. Maung Kyō Nyo** ...

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Nuisance, actionable—Owner of land lower the canal filling the gap up—

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Owner, beneficial—Purchase of property by Hindu husband in name of his wife ; See Benami.

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——, lower, liability of—Blocking of canal by lower land owner—Consequent flooding and damage to owner of land higher up the canal ; See Nuisance.

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Parties by consent, if can confer jurisdiction ; See Appeal.

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Party—Liability of defendants not arising on contract but on privity of estate ; See Suit, maintainability of

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——, if in revision, apply to the President of the Tribunal for his decision on a new point—Party not seeking decision of that point from the controller ; See Jurisdiction.

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——, necessary—Suit for rent—Persons under joint liability ; See Suit, maintainability of

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—— to submission to arbitration, if can question the validity of proceedings instituted at his instance—Jurisdiction ; See Appeal

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Patent—Revocation—*Patents and Designs Act (II of 1911), Sec. 26*—'Utility'—'Novelty'—'Invention'—*Patent for making in one piece.*

In patent law the term 'utility' is used, not in the abstract, but in a very special sense. Mere usefulness is not sufficient to support a patent.

To be new in the patent sense, the novelty must show invention.

Patents for making in one piece, articles, previously made in two or more pieces have generally been held invalid. **Indian Vacuum Brake**

Co. Ltd. v. E. S. Luard

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Patent law—New—Novelty ; See Patent.

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—— Utility—Usefulness ; See Patent

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Patents for making in one piece, articles, previously made in two or more pieces ; See Patent

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Penal Code, Sec. 127—Certificate given by accused, entitled to money on the death of widow, the depositor, that the depositor was alive and sane—Post office Savings Bank Act and rules made there under ; See Certificate.

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— of the Tribunal, when can express opinion as to rent paid on 1st November, 1918, unduly low ; <i>See</i> Jurisdiction	588
Presumption — <i>Hindu Law</i> — <i>Dayabhaga School</i> — <i>Joint family</i> — <i>Father and son</i> — <i>Property acquired in the name of son</i> .	
The presumption in Hindu law that in joint family governed by the <i>Dayabhaga School</i> , that while a family remains joint, all properties including	

Presumption—(Contd.).

acquisitions made in the name of individual members are joint property, does not apply in the case where the family at the time of the acquisition consisted of father and his sons.

"Where the question is whether property standing in the name of the junior member of a Hindu joint family is his self-acquisition, the criterion is to consider from what source the money comes with which the purchase money is paid. Therefore in the absence of evidence that the junior member had any separate funds or that the property in question was purchased with money belonging to him the presumption is clear and decisive that it was acquired by the head of the family in the name of the junior member and that it was not the self-acquired property of the junior member." This presumption applies to a family governed by the Dayabhaga School of Hindu law as also to such a family consisting of a father and his sons. **Jasoda Sundari (Alias Pravabati) Chaudhurani v. Lal Mohan Basu...**

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Presumption—Immemorial existence of custom—Evidence showing exercise of a right in accordance with an alleged custom; See Impartible estate.

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—Separation—Junior members of impartible estate residing or messing separately; *See Impartible estate*

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—of share—Trustee purchasing with another the property of *cestui que trust*; *See Trust.*

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Privy Council, if interferes with discretion exercised under section 34 of the Code of Civil Procedure; *See Interest.*

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Reading over depositions of all the witnesses at the close of the day is not sufficient compliance with the provisions of section 360 of the Code of Criminal Procedure.	
Section 360 of Criminal Procedure Code is mandatory and its provisions must be strictly complied with. This view is based on the wording of the section and the policy underlying it, namely, to protect the witness and also to safeguard the interest of the accused by affording to the witness as well as the accused an opportunity of finding any inaccuracy in the record of the depositions.	
It is desirable that the evidence of each witness should be read over to him after it is completed before the evidence of another witness commences ; and the reading over should not be postponed till all the witnesses are examined. <i>Abdul (Bari) Mallick v. King Emperor</i>	585
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Section 158B of the Bengal Tenancy Act requires that in order to sell a tenure by one or more co-sharer landlords all the remaining co-sharer landlords should be made parties to the suit, and also that when one or more co-sharer landlords having obtained a decree in a suit properly framed applies for execution of a decree by the sale of the tenure, notice of the application for execution should be given to all the co-sharers. This obligation of serving notice on co-sharer is not sufficiently carried out by serving notices on some of them.

The special provision of the Bengal Tenancy Act which allows one or more of co sharer landlords to sell a tenure or holding in execution of their

Rent suit—(Contd.).

decree must be strictly followed in order to give complete title to the auction-purchaser and it will not be sufficient to say that the ijaradar under a particular co-sharer was a party in other capacity being himself a co-sharer in the zemindari and therefore the absent co-sharer was sufficiently represented in order to bring into operation the special provisions laid down in section 158B of the Bengal Tenancy Act.

A taluk was held by A under several co-sharer zemindars. The plaintiffs were the proprietors of the zemindari to the extent of one anna odd share. They brought a suit for rent against A for their share of the rent of the taluq and in execution purchased it on the 21st September, 1909. X, another co-sharer zemindar brought a suit on the 15th April, 1910 for the entire rent due on account of the taluq but Y another co-sharer zemindar was not made a party. Y purchased a share of the zemindari on the 27th November, 1909, but his name was not registered under the Land Registration Act till 19th August 1910. Y gave a lease of his zemindari to Z the son of the plaintiff No. 1. Z was made a party in the suit of X both as a co-sharer and as an ijaradar X in execution of his decree sold the taluq, which was purchased by defendant No. 8 on the 9th March 1911 :

Held, that the sale in execution of decree held by X did not entitle the purchaser to hold it free from all encumbrances owing to absence of notice to Y.

That Y was not sufficiently represented in the suit of X by his ijaradar.

That Y was the owner from the date of his purchase.

That there was no duty cast upon the plaintiffs who were made *pro forma* defendant in the suit by X, of stating the incumbrance at the time of the sale to the intending purchaser.

That as the ijaradar was on the record in X's suit not merely as a co-sharer zemindar but also as an ijaradar of Y, he would be estopped from asserting in the present suit that the sale in execution was not a sale free from incumbrances. By the doctrine of equitable estoppel his standing by and allowing the purchaser in believing that he was purchasing the taluq free from all encumbrances, precluded him from now asserting in the present proceeding that the decree in X's suit was not a rent decree and that, therefore, the sale in execution was not a sale free from encumbrances. **Jabed Ali Taluqdar v. Surendra Nath Bando-**
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of the Code of Criminal Procedure nor rejected an application for the making of a complaint, then the superior Court may take action and make a complaint. But where the Subordinate Court has rejected the application for the making of such complaint, then the procedure, which is contemplated by the Code of Criminal Procedure, is by way of appeal to the superior Court.

An appeal preferred more than thirty days from the date of order rejecting the application for the making of the complaint, is barred by limitation under article 154 schedule 1 of the Limitation Act.

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No second appeal lies from an order passed in appeal from an order passed under order 21 rule 89 of the Code of Civil Procedure setting aside an execution sale after deposit of money, though the decree-holder was the execution purchaser.

All orders between decree-holder and judgment debtor under section 47 of the Code of Civil Procedure are not decrees and appealable as such.

Clause (a) of section 47 of the Code of Civil Procedure excludes an order which is an adjudication from which an appeal lies as an appeal from order under order 43 rule 1. **Banshibadan Mandal v. Chhaunat Bibi (alias) Channu Bibi** ...

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Held, by majority (C. C. Ghose and Mukerji, JJ. Contra) : A suit for rent is maintainable against some of the heirs or successors in interest of a deceased tenant without bringing all the heirs or successors in interest on the record.	
Per B. B. Ghose, J : Such a suit is maintainable but a decree in such a suit will not have the effect of a decree for rent under chapter XIV of the Bengal Tenancy Act.	
Per Mukerji, J : The suit as framed is not maintainable without impleading as defendants all the parties who are known to be the tenants of the holding, but the suit cannot be dismissed on that ground. The Court must proceed under order 1 rule 10 (2) Civil Procedure Code to make an order for the addition of such of these persons as are not already on the record as defendants, and it is only in the event of the necessary amendments not being made that the suit is liable to be dismissed. On such amendment being made the suit should be tried out against the added defendants in accordance with the law and the suit will not fail merely because the plaintiff may have lost his remedy against the added defendants.	
Per B. B. Ghose, J : The heirs of a tenant do not take the tenancy as an entire body forming as it were a partnership or a corporation, the individual members of which have no definite interest. They took as tenants-in-common, each having a definite share in the whole, which he might deal with in any way he pleased.	
The liability of a tenant to pay rent arises from the fact of possession of the land as a tenant where there is no express contract, and all persons in possession of land as tenants are under an implied obligation to pay the rent for the land to the landlord, whether they got into possession by right of succession or assignment.	
A tenant in common is entitled to possession of every part of the estate and there is privity of estate between him and the landlord in the whole of the leasehold. The law imposes a liability on a tenant-in-common based on privity of estate for all covenants running with the land, and as his estate is an estate in the whole of the leasehold, there is no reason why he should not be liable for the entire rent.	

Suit—(Contd.).

Per Mukerji, J: When a person obtains a share of a tenure either by assignment or by inheritance he becomes co-tenant with the other tenant or tenants in the whole tenure, and in so far as the relations between him and his landlord are concerned he cannot be deemed to hold any estate in severalty. Each one of the persons on whom a share of the estate may vest by assignment or inheritance becomes a tenant-in-common in the whole of the estate by reason of the indivisibility of the estate without the landlord's consent. Each one of such co-tenants has a privity of estate with the lessor in respect of the whole estate and will be liable to the lessor on the covenants running with the land, and so, for the whole rent.

Per B. B. Ghose, J: Section 43 of the Indian Contract Act may be applied in such a case; that section is applicable to express as well as implied premises.

Per Mukerji, J: Except in the case of original lessees or persons who were parties to the contract, the provisions of section 43 of the Indian Contract Act have no application.

Per Mukerji, J: If lands are let out to two or more tenants, their liability to pay the rent is joint and several, except where it is made joint and not several by express agreement; the liability of assignees of the original tenant or tenants may be joint liability *inter se* as amongst the assignees, or it may be a joint and several liability; if there is an agreement to that effect the liability of the persons upon whom the rights of the original tenant or tenants devolve on the death of the latter is a joint liability to the extent of the interest which devolves and not a joint and several liability in respect of that interest, as the whole body of persons who succeed in this way constitute in law but one heir.

Cases of joint liability or of joint and several liability do not come with right to have his co-debtors joined,

In this country there is no reason why this general right should be denied to a person under a joint liability where the liability arises not under a contract to which order 1 rule 6 of the Code of Civil Procedure is confined and where the persons are neither severally nor jointly and severally but are only jointly liable.

In a case where the liability of the defendants arises not on contract, but on account of privity of estate, the defendant may insist on all the persons jointly liable, to be made party defendants. All such persons are not merely proper but also necessary parties. If objection is taken to the maintainability of the suit in their absence, the Court has to follow the provisions of order 1 rule 10 (2) of the Code of Civil Procedure.

In a suit for rent, persons who are under a joint liability to pay the rent are necessary parties.

A lessor is bound to implead in his suit all the lessees or assignees from the lessees who are known to him.

Suit—(Contd).

A decree obtained in the absence of some of the co-tenants is not a nullity but a valid decree and is effective only as a decree for money.

But, if objection is taken at the right moment as to the maintainability of the suit, the suit is not properly constituted. **Kailash Chandra Mitra v. Brojendra Kumar Chakravarti** ... 232

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Where the plaintiff does not desire to withdraw from the suit unless with liberty to bring a fresh suit, and the Court considers that such liberty should not be granted, the proper course is simply to dismiss the application. It is not necessary for the plaintiff to expressly take such objection before his application is rejected. **Kamini Kumar Roy v. Rajendra Nath Roy** ... 219

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Section 78 of the Land Registration Act is no bar to a person recovering rent although the person who should have been registered as the proprietor and through whom he claims, has not been so registered.

• Section 78 of the Land Registration Act is inapplicable to the case of an assignee of rent, though the name of the assignor has not been registered under the Act.

The Court can accept a part and not accept the rest, of the entry in a Khatian. **Prasanna Kumar De Mahajan v. Nanigopal De** ... 141

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Suit to set aside decree—Appeal—Irregular order of remand—Decree in former suit comprising excess land—Civil Procedure Code (Act V of 1908), Sec. 47, O. 41 R. 23—Fraud—Jurisdiction.

Suit—(Contd.)

An appeal lies against an order remanding a case by the appellate Court which, in form and substance, is an order under O. 41 R. 23 of the Code of Civil Procedure whether regularly or irregularly made.

The question as to whether the decree in the former suit comprises excess and which did not form the subject matter of the suit is a question which can only be gone into by the execution Court under section 47 of the Code of Civil Procedure and a fresh suit does not lie.

The main object underlying section 47 of the Code of Civil Procedure is to prevent multiplicity of suits and to secure that all matters, which can be decided in the suit, shall be so decided.

The plaintiff suing to set aside the former decree on the ground of fraud, can only succeed on proving fraud, and in the absence of finding of fraud the merits of the case cannot be gone into in the second suit for setting aside the decree.

The word 'jurisdiction' may be used in two senses, viz. in the sense of jurisdiction over the subject matter of the litigation or in the sense of power to make an order. **Kayem Biswas v Bahadur Khan** 22

Suit to set aside decree on the ground of fraud—Fraud not proved—Merits if can be gone into; *See* Suit to set aside decree 22

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Trust—Trustee and stranger purchasing in execution—Inadequate price—Invalidity of purchase of one owing to some original relation with property—Title of other purchaser, if affected—Partial setting aside of execution sale—Presumption of share.

A trustee is not absolutely debarred from buying his *cestue que* trust's property but the Court will look on such sale with the greatest suspicion and if there is the slightest doubt about its genuineness, it will set it aside.

Per Suhrawardy, J. It is a violation of the principle of estoppel and equity to allow a trustee to raise a question as to the validity of a trust deed constituting him a trustee in law, for the first time in second appeal after he has taken possession of the properties as trustee and dealt with them in the capacity of a trustee.

A ruling should be construed on the facts on which it is founded.

Per Curiam: On the 18th September 1896 and 1st July 1899 one S, husband and father of the plaintiff borrowed certain sums on notes of hand from defendants Nos. 1 and 2. On the 5th. December, 1902, S and his co-sharers including defendant No. 2 executed a deed of trust in favour of two co-shares, one of whom was defendant No. 1. Under the deed, the trustees took upon themselves the charge of all necessary duties for the management and protection of the joint estate. In 1903, S died leaving a widow, plaintiff No. 2, and his son plaintiff No. 1. On the 3rd April, 1904, the defendants Nos. 1 and 2 sued the son of S on the hand notes and on the 23rd August obtained a decree against him as representing the estate of S. This decree was subsequently executed and S's share in the property was sold in auction and purchased by defendants Nos. 1 and 2 at a very inadequate price. At the time of sale, defendant No. 1 was the trustee of the estate and defendant No. 2 was not the trustee at all. The present suit was brought on the 12th September, 1918 by the plaintiffs for setting aside the decree and the sale in execution thereof as fraudulently obtained and for recovery of, or in the alternative, for confirmation of possession of the property in suit. It was found that the decree and sale were not vitiated by fraud and were regular in all respects.

Trust—(Contd.)

Held, that in consideration of the fiduciary relation existing between the parties and of the fact that the properties were sold at an inadequate price, the purchase by defendant No. 1 could not stand, and the sale of the property to him was inoperative ineffectual and unenforceable against the plaintiffs to the extent of his share.

That the purchase by defendant No. 2 was not affected by reason of the incapacity of his co-purchaser, and should prevail.

That as the shares of the purchasers were not defined, it might be presumed that they had one-half share each. **Priya Nath Chatterjee v Lakshmi Narayan Bhattacharjee**

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Trustee, if can buy *cestui qui* trust's property ; *See* Trust

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Trusts, if can be enforced against persons coming into possession of trust property with notice ; *See* Impartible estate

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A document purporting to be a will and an authority to adopt a son was executed by a youth aged 19 years who was under the legal guardianship of his mother. He died immediately after executing the document on the 1st October, 1906, leaving him surviving his widow (the grantee of the aforesaid authority to adopt), his mother above-mentioned, and two daughters. On the 2nd November, 1906 the father of the boy with reference to whom the widow subsequently went through a form of ceremony of adoption, presented, without the knowledge of the testator's widow or mother, the document for registration, and it was eventually so registered as a will on the 20th December, 1906. On the 24th December 1913, the widow went through ceremony of adopting as a son, of the person

Will—(Contd.).

who had presented the document for registration in November 1906, and the deed of adoption that she executed on that date recited that the adoption was in exercise of the power in that behalf contained in the testator's will of the 1st October, 1906:

Held, (1) the will, being that of a minor under a guardianship, it was, under the Majority Act, section 2 and 3, the Succession Act, section 46, the General Clauses Act section 3, void and of no effect as to the testator's estate.

(2) Under the Registration Act, 1877, that part of the document that contained the authority to adopt not being registered within four months by or at the instance of the grantee thereof, was also void, as also was the deed of adoption of the 24th December 1913 and the act of adoption which is purported to carry out in pursuance of the will of the 1st October, 1906.

A power to adopt may be embodied in a will referred to.

A will by a minor has no legal effect and is not capable of disposing of any of the estates of the deceased.

A document which purports to be a will but is inoperative as such may constitute a valid authority to adopt. **Kondapalli Vijayaratnam v.**

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Erratum.

Page 39 line 15 from top for "section 23" Read "sections 2 and 3"

Page 560 line 23 from top for "is" Read "it".

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The Calcutta Law Journal

ADMISSION OF ADVOCATES.

New High Court Rules.

The following Rules have been framed by the High Court under section 10 of the Letters Patent, 1865, for admission of advocates.

1. Persons who are not entitled to be admitted as Advocates under the provision of Rule 1, Chapter I, may be admitted as Advocates of the High Court under the following Rules appearing in this Chapter.

2. From and after the 10th November 1924, and until the expiration of seven years therefrom, or such further period as the Court may determine, a Vakil or Attorney of this Court of not less than ten years' standing, on application by petition stating that he desires to be admitted as an Advocate of this Court and that his name is borne on the Roll of Vakils or Attorneys of this Court, as the case may be, and that his application, if any, for admission as an Advocate has or has not been refused by any other Court in India, may be admitted as an Advocate of this Court. Such application shall be supported by the certificate of one of the Registrars of this Court to the effect that the applicant's name is borne on the Roll of Vakils or Attorneys of this Court, as the case may be, and such certificate shall also state the date of his enrolment.

3. From and after the 1st of July 1925, and until the expiration of seven years therefrom or of such further period as the Court may determine, a Vakil of this Court of less than ten years' standing, on application by petition containing the statements mentioned in the last preceding Rule and supported by a certificate of the Registrar of this Court in its Appellate Jurisdiction, to the effect that his name is borne on the Roll of Vakils of this Court and mentioning the date of his enrolment, may be admitted as an Advocate of this Court provided that he produces the certificates hereinafter mentioned, viz :—

(a) A certificate signed by the Secretary of the Board of Exa-

miners, mentioned in Rule 15, that he has satisfactorily passed an examination in the following subjects, viz.—

(1) Commercial Law, including Negotiable Instruments, Sale of Goods, Affreightment, Insurance and Arbitration.

(2) Company and Insolvency Law, together with the Rules and Procedure on the Original Side relating thereto.

(3) The Letters Patent (including any modifications thereof) and Rules of the High Court on the Original Side.

(4) The Principles of the Law and Procedure in the High Court as to Guardians and Wards, and Lunacy, and in the Testamentary and Intestate, and Matrimonial Jurisdictions.

(b) A certificate from a practising Advocate approved by the Court, as provided in Rule 14, stating that he has read for a period of 12 months in the said Advocate's Chambers in Calcutta.

4. From and after the 1st of July 1925, and until the expiration of seven years therefrom or such further period as the Court may determine, an Attorney of this Court of less than ten years' standing, on application by petition containing the statements mentioned in Rule 2 and supported by a certificate of the Registrar of this Court in its Original Jurisdiction, to the effect that his name is borne on the Roll of Attorneys of this Court and mentioning the date of his enrolment, may be admitted as an Advocate of this Court, provided he produces the certificates hereinafter mentioned, viz.—

(a) A certificate from a practising Advocate approved by the Court, as provided in Rule 14, stating that he has read for a period of 12 months in the said Advocate's Chambers in Calcutta.

(b) A certificate that he has passed under these Rules an examination in Commercial Law, including Negotiable Instruments, Sale of Goods, Affreightment, Insurance and Arbitration, signed by the Secretary of the Board of Examiners mentioned in Rule 15.

5. Any person who had obtained after examination a Bachelor's degree in Law of the University of Calcutta, Allahabad, Bombay, Dacca, Madras, Patna or the Punjab, or a corresponding degree of such other University in India or elsewhere as the Court may accept as equivalent, may, on application by petition verified by an affidavit and on proof of the University degree which he has obtained, be admitted as an Advocate on production of the following certificates:—

(a) Certificates, signed as stated in Rule 3, that he has passed an examination in the subjects mentioned in each of the following parts:—

PART I.

- (1) Equity, including Trusts and Specific Relief.
- (2) The Law of Contract.
- (3) The Law of Tort.

PART II.

- (1) The Law relating to Property, including the Transfer of Property Act, together with the Principles of English Law applicable thereto, the Elements of Practical Conveyancing, and the Law of Easements.
- (2) The Law of Land Tenures, Land Revenue and Prescription, including the Regulations and the Bengal Tenancy Act.
- (3) The Law of Succession, including the Indian Succession Act, the Hindu Wills Act, the Probate and Administration Act and the Succession Certificate Act.

PART III.

- (1) Commercial Law, including Negotiable Instruments, Sale of Goods, Affreightment, Insurance and Arbitration.
- (2) Company and Insolvency Law together with the Rules and procedure relating thereto on the Original Side and in the Subordinate Courts.
- (3) Civil Procedure with special reference to Discovery, Pleadings and Limitation, and the Law of Evidence.
- (4) The Letters Patent (including any modifications thereof and Rules of the High Court on the Original and Appellate Sides; also the Law and procedure under the Indian Divorce Act (IV of 1869).

(b) A certificate from a practising Advocate, approved by the Court, as provided in Rule 14, stating that he has read for a period of twelve months in the said Advocate's Chambers in Calcutta after passing the examinations hereinafter prescribed.

(c) Two satisfactory testimonials as to his good character :

Provided that an applicant who has obtained after examination the Master's or Doctor's degree in Law of any of the Indian Universities mentioned in this Rule, or a degree of any other University which the Court shall accept as equivalent to either of the said degrees, shall not be required to pass in Parts I and II.

A candidate may sit for Parts I and II abovementioned at the same examination or at different examinations. He shall not sit for Part III until he has passed in both Parts I and II. A candidate must pass in each of the papers of a part at one and the same examination before he shall be deemed to have passed in that part.

6. The Registrar shall submit the petition to be admitted as an Advocate with the other necessary documents prescribed by the Rules in this Chapter to the Chief Justice and Judges.

7. The Registrar shall enter in a book to be kept for the purpose the names in alphabetical order of such Advocates who may be approved by the Court as being entitled to take pupils in their Chambers.

8. No Advocate, without the leave of the Court, shall be entitled to take more than two pupils at one and the same time.

9. An Advocate taking a pupil under these Rules shall give notice of that fact to the Registrar in the following form, which shall also be signed by the pupil:—

**In the High Court, etc.,
Ordinary Original Criminal Jurisdiction,**

In the matter of A. B., a candidate for admission
as an Advocate.

THE REGISTRAR, ORIGINAL SIDE.

SIR,

Please take notice that on the _____ day of _____ 192 , I admitted Mr. _____ of _____ as my pupil to read in my Chambers for a period of twelve months from the said date with a view to qualify himself for admission as an Advocate of this Court.

(Sd.)

Advocate.

I, _____ hereby give notice that I have joined Mr. _____ an Advocate of this Court, as his pupil to read in his Chambers for a period of twelve months from day of _____ 192 , with a view to qualify myself for admission as an Advocate of this Court.

(Sd.)

Pupil.

10. The notice mentioned in the last preceding rule shall be filed with the Registrar within a month from the date of admission of the pupil.

11. Notices received by the Registrar under Rule 9. shall be entered by him in a book to be kept for the purpose, and the entries therein shall be indexed in the names of the Advocates concerned.

12. Where, by reason of death or for any other reason which may seem good and sufficient to the Court, a candidate cannot complete the aforesaid period of twelve months as a pupil in the Chambers of the Advocate with whom he has been reading, he may

read for the unexpired period in the Chambers of any other Advocate approved as aforesaid, and in such case, a fresh notice as provided in Rule 9 shall be given to the Registrar and filed within the time hereinbefore mentioned.

13. No person, who shall be admitted as a pupil for reading in the Chambers of an Advocate for the purpose of being admitted as an Advocate under these Rules, shall, during the said period of twelve months, hold any office or be engaged or concerned in any other employment, profession, business or trade whatsoever. Every such person shall, during the whole period, continue and be really and actually engaged in the Chambers of the Advocate.

14. The certificates mentioned in Rules 3 to 5 shall be in the following form:—

**In the High Court, etc.
Ordinary Original Criminal Jurisdiction.**

In the matter of A. B., a candidate for admission as an Advocate.

I, _____, a practising Advocate of this Court, approved by the Court, under the provisions of Rule 7, Chapter I A, relating to the admission of Advocates, do hereby certify that the above-mentioned A. B. read in my Chambers for a period of twelve months from the _____ day of _____ 19____. During the same period he was diligently and faithfully working in my Chambers and was not engaged or concerned in any other profession, trade, business or employment.

I do hereby further certify that he is a fit and proper person to be admitted as an Advocate of this Court.

15. The Chief Justice may, from time to time, appoint a Committee of control for the purpose of—

- (a) supervising the examinations referred to in Rules 3 to 5,
- (b) appointing a Board of Examiners for each examination, and
- (c) dealing with all questions arising in connection with such examinations.

Not less than half the members of the Board of Examiners shall be Advocates of the Court.

The Committee of Control may, with the approval of the Court, from time to time, prescribe the limit of each of the subjects for examination under these Rules by reference to text-books or legislative enactments and statutes or leading cases.

16. Every person intending to appear at any of the said examinations shall give one calendar month's notice in writing to

the Registrar, stating his intention and mentioning the part or parts he desires to be examined in, and if the notice be for Part III, shall state the date or dates he passed in Parts I and II. He shall, at the same time, pay to the Registrar the following fee: (1) for first appearance at any examination, Rs. 300; (2) for each subsequent appearance at any examination, Rs. 150; and the fees so paid shall be placed to the credit of a fund called "The Advocates' Examination Fee Fund."

17. Every person who shall have given notice of his intention to appear at any of the examination mentioned in this Chapter, or to apply for admission as an Advocate, and who shall not have attended to be examined, or not have passed the examination, or not have been admitted may renew the notice for examination or admission, from time to time as often as he shall think proper: Provided that every renewed notice shall be given in conformity with the Rules in this Chapter, unless the Court shall otherwise order.

18. All expenses that may be incurred on account of the examinations to be conducted under these Rules shall be defrayed by the Registrar out of the said Fee Fund. The scale of remuneration of the examiners shall be as follows:—

	Rs.
For setting a paper	100
For examining an answer paper	10

The Registrar shall be *ex officio* the Secretary to the Board of Examiners and the custodian of "The Advocates' Examination Fee Fund."

19. The examinations hereinbefore referred to shall be held once in every six months at such time and place as the Committee of Control may appoint. Notice of the time so fixed shall be given by the Registrar at least six weeks beforehand by affixing the same on the Registrar's Notice Board and forwarding copies thereof to the Secretaries of the Bar Library, the Vakils' Library and the Incorporated Law Society.

20. The Registrar shall reduce all notices of intention to appear at any of the examinations mentioned in this Chapter into an alphabetical table, under convenient heads, and shall, three weeks previous to the examination, affix the same on the Notice Board at the East Gate, and also on the Registrar's Notice Board to be exhibited daily, and shall forward copies thereof to the Committee of Control; Secretary, Bar Library; Secretary, Vakils' Library; and Secretary, Incorporated Law Society of Calcutta.

The Registrar shall inform each candidate who shall have given notice of his intention to appear at any of the said examinations of the days fixed for each examination.

21. There shall be a paper on each of the subjects mentioned in Rules 3 to 5, the number of questions in each paper shall be 10, and the aggregate number of marks in each subject shall be 200. To be entitled to pass, a candidate must obtain 62 per cent. of the total marks in each paper set at the examination.

22. Any candidate bringing into an examination room any book, document, or printed or written paper whatsoever, or communicating in any way with another candidate, or copying from another candidate in the examination room, or using any unfair means whatsoever, or assisting another candidate in so doing, will be liable to be summarily ejected from the examination room, and shall not, unless the Court shall otherwise order, be permitted to appear at the same examination or at any subsequent examination.

23. Nothing in these Rules shall be construed to entitle any person to be admitted as an Advocate if he has been guilty of any fraud, dishonesty, or other disgraceful conduct, or is of doubtful reputation, or is an undischarged insolvent, or has been convicted by any Criminal Court for any offence showing such moral turpitude as would, in the opinion of the Court, amount to disqualification.

24. From and after the date on which these Rules come into force, Advocates will take precedence on the Original Side and in the Court for hearing appeals for the Original Side according to the dates on which they were called to the Bar or were admitted originally as Vakils or Attorneys of the Court, provided that Barristers who have been admitted as Advocates before these Rules come into force shall take precedence according to the dates on which they were called to the Bar.

25. Subject to what is hereinbefore stated, Advocates admitted under these Rules shall be governed by the Rules of Chapter I of the Rules of the Court on the Original Side.

26. Persons admitted as Advocates under the Rules under this Chapter shall, in all respects, conform to the practice of, and shall be subject to, the same obligations and rules of professional etiquette as govern Advocates practising on the Original Side of the Court on the date on which these Rules come into force, so that no Advocate admitted under these Rules shall be entitled to act on either side of the High Court or in any Court subordinate thereto.

27. Every person, when admitted and enrolled as an Advocate of this Court, shall be entitled, on payment of the prescribed fee,

to obtain a certificate of admission under the signature of the Registrar and the Seal of the Court.

28. An Advocate of this Court admitted under this Chapter may, on the payment of a fee of Rs. 5 in Court-fee stamps, obtain a certificate under the signature of the Registrar and the Seal of the Court that his name is borne on the Roll of Advocates of this Court.

29. An Advocate admitted under these Rules who desires to have his name struck off the said Roll of Advocates shall apply by petition containing the particulars and statements mentioned in Rule 10, Chapter I, so far as they may be applicable to the case, and shall be entitled to have his name removed from the said Roll of Advocates. A name once removed under this rule shall not be restored again to the said Roll of Advocates. The procedure laid down in Rules 9 to 13 inclusive of Chapter I shall be followed in the case of an application under this Rule.



Rai Surendra Chandra Sen Bahadur

The Calcutta Law Journal

THE LATE RAI SURENDRA CHANDRA SEN BAHADUR.

It is our painful duty to record the death of Rai Surendra Chandra Sen Bahadur, which took place on Friday, the 3rd of July, 1925 at about 9 P. M. He was an acknowledged authority on Tenancy law and his valuable services in connection with the Committee appointed to consider amendment of the Bengal Tenancy Act are still in our memory. To quote the words of His Excellency, the Governor of Bengal he placed his unrivalled knowledge and experience ungrudgingly at the disposal of the Committee and Government owes him a great debt of gratitude. We beg to offer our sincere condolence to the members of the bereaved family.

Reference in Court.

Tributes to the memory of late Rai Surendra Chandra Sen Bahadur were paid by the Bench and the Bar at the Calcutta High Court on Monday the 6th of July 1925 before a full Court composed of the Chief Justice and all the other Judges.

On their lordships taking their seats, *Mr. Mohendra Nath Roy* President of the Vakils' Association said:—"It is with a heavy heart that we have to convey to your Lordships the mournful news of the untimely death of Rai Surendra Chandra Sen Bahadur, a well-known Advocate of your Lordships' Court. His death took place on last Friday night at a comparatively early age of 59 years. He was in indifferent health for some time but latterly he was reported to be progressing favourably. Mr. Sen commanded an extensive practice, specially in cases involving the land laws of Bengal, of which subject he was recognised as an authority. After 35 years of strenuous work in the profession he has passed away. Mr. Sen's annotated edition of the Bengal Tenancy Act is a monument of great scholarship, research and industry. The book is treated both by the Bench and the Bar as the leading authority and the indispensable book on the subject. It made Mr. Sen famous. His very valuable services as a member of the Bengal Tenancy Act Amendment Committee were specially appreciated by Government.

Mr. Sen was also a good Bengali writer and gave his leisure hours to writing essays and poems. One of such works was only published last week. His genial and kindly disposition, simplicity of character and never failing courtesy endeared him to all who came in contact with him. His family attachment was unparalleled.

The *Advocate General*, on behalf of the Bar, said that he came to know the deceased a few years after he joined the Bar. Even then his great ability, his good manners and courteous disposition marked him out for the success that he attained afterwards. His loss will not only be felt by the profession but will be a personal loss to many people who came in contact with him.

Mr. Mohini Mohan Chatterji on behalf of the Incorporated Law Society, associated himself with what the previous speakers had said.

The Hon'ble the Chief Justice then said, "Every one who knew him will be exceedingly sorry to hear of the death of Mr. Surendra Chandra Sen. He was one of those who, in my opinion can be ill spared and his death will cause a severe loss not only to the Court, but also to his large circle of friends.

"I was always glad to see Mr. Sen in Court, for I knew that the points which he desired to argue would be stated forcibly, clearly and concisely without any waste of time. Further more I was sure that if there were any real objections to the case which he was presenting he would not fail to bring them to the attention of the Court. He was well known as a sound lawyer and in one particular branch of it he was recognized as an expert and whenever he appeared in Court he was a real assistance to it.

"He was one of the old school, a true gentleman in the real sense of the word, always reliable and invariably considerate and courteous. I regarded him as a personal friend and I regret very much that I did not know that he was ill, for I should have liked very much to have seen him, at any rate, once more before he died.

"I should be glad, Mr. Roy, if you will convey the sympathy of my learned brothers and of myself to the members of his family for the great loss which they have sustained."



The Hon'ble Sir Nalini Ranjan Chatterjea, Kt.,
• Acting Chief Justice of Bengal
August 1925.

The Calcutta Law Journal.

ACTING CHIEF JUSTICE.

We offer our respectful congratulations to the Hon'ble Sir Nalini Ranjan Chatterjea, Kt upon his appointment as the acting Chief Justice of Bengal during the absence on leave of the Hon'ble Sir Lancelot Sanderson. All branches of the legal profession met in His Lordship's Court on the 3rd of August last to offer him a welcome upon the assumption of this high office. We whole heartedly associate ourselves with all that was said on the occasion to give expressions to the universal sense of satisfaction which the appointment has caused. Sir Nalini Ranjan has now been connected with the High Court for 37 years—as a Judge since 1910, and whether at the Bar or on the Bench he has lived up to the highest traditions of the profession to which he belongs.

Bars congratulation to Sir N. R. Chatterjea.

On his assumption of the office of Acting Chief Justice of Bengal Sir Nalini Ranjan Chatterjea was congratulated by all sections of the Bar at the High Court.

The Court room of the Chief Justice where the ceremony took place was packed with members of the legal profession and the public.

Mr. B. L. Mitter, officiating Advocate General, congratulating his lordship on behalf of the Bar said :—"I respectfully offer our hearty congratulations on your assumption of the highest judicial office in the land. No one practising in this court appears before you without feeling that he will get a patient hearing, and no litigant leaves this court without feeling that his case had been patiently and anxiously considered. You have maintained the highest traditions of the Bench and I cannot see any words which can convey a higher approbation of your judicial conduct than what the Bar feels."

On behalf of the Vakils' Association, the Hon. Dr. Dwarka Nath Mitter said :—"I beg to offer you our warmest congratulations on your appointment as the acting Chief Justice of Bengal. Ever since your elevation to the Bench of the High Court, now

about fifteen years ago, your lordship has been uniformly courteous to all who have appeared before you, and your untiring patience and good temper, coupled with your great ability and deep knowledge of law have commanded universal confidence in the administration of justice in the Courts over which you have presided. I speak no language of convention when I say that your appointment as Chief Justice of Bengal will be hailed with delight throughout the length and breadth of the country. It is a matter of special gratification to us that for the fourth time in the history of this Court, a distinguished and illustrious member of the Vakils' Association has been called on to the highest judicial office under the Crown in India. We hope and trust that your lordship's tenure of office would be a successful one, and that you will maintain the dignity, prestige and traditions of his high office."

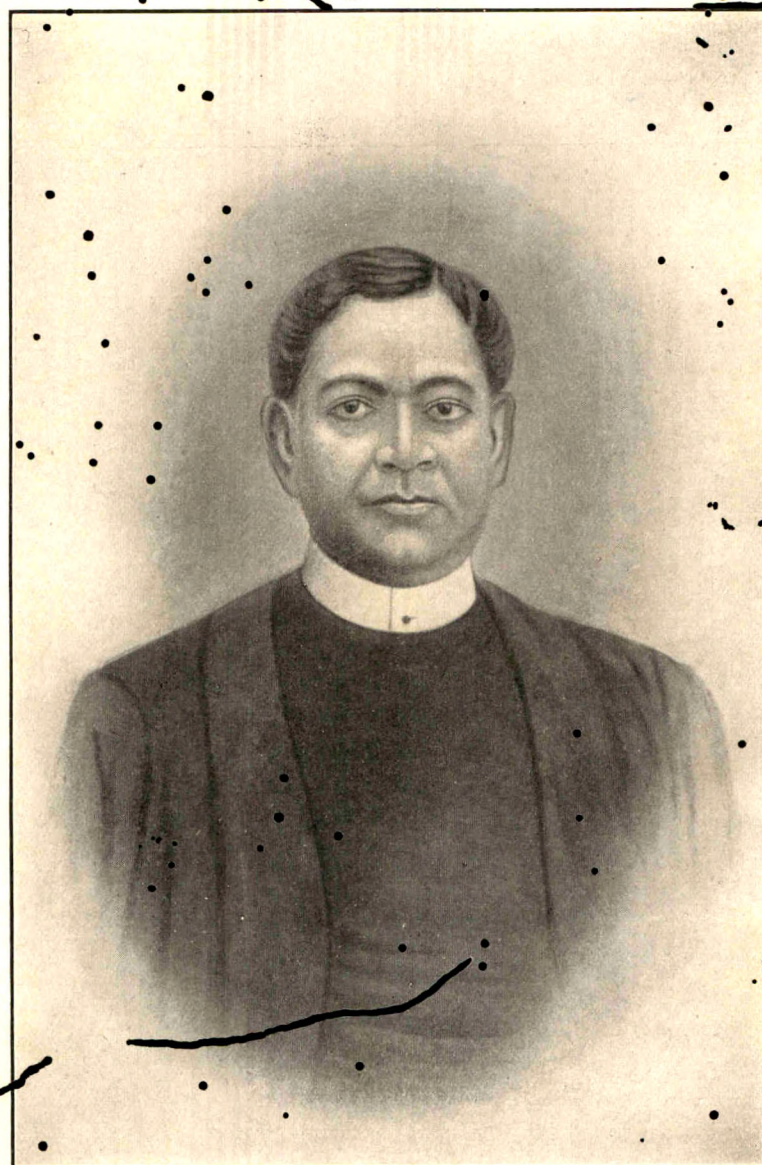
Mr. Mohini Mohan Chatterjee on behalf of the Incorporated Law Society associated himself with all that had been said by the previous speakers.

Sir N. R. Chatterjee in reply said:—"Mr. Advocate-General Dr. Mitter and Mr. Chatterjee. I thank you and the members of the profession for whom you have spoken for the cordial reception you have so kindly given me and the good wishes you have so kindly expressed. I wish I could appropriate to myself all that you have said about me. If I have been able to give any satisfaction in the discharge of my duties to the members of the profession and the litigant public it is mainly due to the valuable assistance which I have always received from the bar, and which I confidently hope to receive not only during the very short period I will be acting as Chief Justice but until I retire from the Bench. I thank you again for the kind and cordial reception."

REVIEW.

M. C. Sarkar's Civil Court Practice and Procedure with Model Pleadings and Deeds, 4th Edition by S. C. Sarkar B.L. Price Rs. 4/12 with Bengali Part Calcutta: M. C. Sarkar and Sons. 1925.

That the book has gone into four editions is ample evidence that it has satisfactorily met a felt want. The author has confined himself to practice and procedure in the Mofussil Courts only and has dealt lucidly and exhaustively with points of law and procedure.



MR. MOHENDRA NATH RAY.



dures which arise every day. The procedure on the Original Side of the High Courts is so different in many respects that any detailed reference to it would have led only to confusion. Yet one feels that on many points it would have been of great use to Mofussil practitioners if the practice on the Original Side with regard to many matters had occasionally been referred to. It would have been some help to Mofussil pleaders as a guide to a more methodical and regular way of doing many things. The book before us covers a wide area and attempts to bring within its compass almost every matter of practice and procedure, every question relating to the practice of a pleader and advocate and the duties of a Judge from taking instructions, to a decree, including useful hints on advocacy and cross-examinations. The Bengalee part containing model pleadings and deeds will be a real help to Mofussil practitioners.

LATE MR. MOHENDRA NATH RAY.

Yet another gap has just been caused in the ranks of the profession which it would be hard to fill. Death has claimed our esteemed friend and colleague Mr. Mahendra Nath Ray, who passed away on the 13th August last leaving us to mourn his loss as a personal bereavement. Of his many qualities of head and heart which made him such a prominent figure every where, whether in the High Court or in the University or in the Municipal Chamber or in the Legislative Council, abundant testimony was afforded by the feeling and spontaneous tributes which were paid to his memory in the High Court and elsewhere. Mr. Ray belonged to a generation which alas, is fast thinning away and was in fact one of its typical representatives with a quiet unobtrusive dignity, a charming urbanity of manners and a sincere regard for truth and honour which marked him out as one of Nature's gentlemen. We recall today with special gratitude his long connection with our journal as a prominent member of the Editorial Committee. Our deepest sympathies go out to his eldest son, Mr. Manmaha Nath Ray, an advocate of this Court and other members of the bereaved family in their great loss.

We reproduce below a short sketch of his life and an account of references in the High Court.

Short Life Sketch.

Mr. Mahendranath Ray was the son of the Late Babu Girija Charan Ray of Tazpur in the district of Howrah and was born in October, 1862, so that he was 63 years of age at the time of his death. While yet a boy, he gave great promise of his future, and in school and college he practically swept everything before him. His career at the University was one of exceptional brilliance; heading the list of successful candidates at every examination from F. A. upwards from the Presidency College. At the B. A. Examination in 1883 he carried off the Eshan, Burdwan and Vizianagram Scholarships and took a First Class first at the M. A., in the following year in his special subject of Mathematics. In 1885 he passed the B. L. from City College, and was enrolled as a Vakil of the High Court on the 3rd September 1886. In the same year he joined the City College as a Professor of Mathematics and Law which appointment he retained till 1898.

In 1891 when Lord Lansdowne for the first time threw open two Fellowships of the Calcutta University to election Mr. Mohendra Nath Ray was one of the two to receive the suffrages of his brother graduates. Lord Lansdowne thus referred to him in his Convocation Address of that year:—

"Babu Mohendranath Ray is an M. A. of six years standing and is one of the most distinguished graduates of the University. His academic career was exceptionally brilliant, he stood first at the F.A., first at the B.A., and first in his own subject at the M.A. examination, and he won some of the most important scholarships prizes and medals that are competed for at the Arts examinations. He is now one of the Lecturers of Higher Mathematics in the City College and in the Indian Association for the Cultivation of Science."

Mr. Ray was ever since returned to the University, time after time by the graduates as their elected representative. From 1910 to the 1918 he was a member of the Syndicate. After Sir Asutosh Mookerjee's death, he was elected Dean of the Faculty of Law, and held that office up to the time of his death. The University will long remember his services. There has been no important Committee of which he was not a member, and no examination from the lowest to the highest for which the University did not.

requisition his service. Though engrossed in the absorbing occupations of a busy professional career at the Bar, Mr. Ray kept up to the last the vivid interest in academic pursuits, notably in his special subject of Mathematics. He was the author of a well-known work on Algebra which is a recognised text book on the subject in many schools.

At the Bar Mr. Ray had his early struggles. For the first 15 years or so he could hardly make any headway. In 1899 he was appointed a Reporter of the Indian Law Reports, Calcutta Series, when he gave up the Professorship in the City College. He held the appointment of Law Reporter till 1904, when upon the Elevation of the Late Sir Asutosh Mookerjee to the Bench, there came a tide in Mr. Ray's professional career. Since that year he quickly built up a growing senior practice, and for the last few years deservedly held the position of leader of the Vakil Bar. He was a universal favourite in the High Court, commanding equally the confidence of the litigants and the judges. His deep knowledge of law, his sweet reasonableness and, above all, his supreme sense of fairness, even to his opponents, won him the unstinted respect and esteem of all who came into contact with him.

Mr. Ray's public activities were not confined to the University. He was deeply attached to his native district of Howrah, and whether as Vice Chairman of the Howrah District Board (from 1888-1896), or as Commissioner and latterly (from 1916-1920) as the first elected non-official Chairman of Howrah Municipality, he rendered valuable services to his fellow-inhabitants of that district. In 1914 the Government rewarded him with the honour of C. I. E. From 1911 to 1920 he was a member of the old Bengal Legislative Council representing the Municipalities of the Burdwan Division.

Mr. Ray leaves a widow, two sons and one daughter. The eldest son is Babu Manmatha Nath Ray, M. L. C., Advocate High Court, and Fellow, Calcutta University, and the younger is a Law student.

The deceased leaves behind him also a large circle of friends and relations to mourn his loss.

Reference in Court.

Before a full assemblage of Judges of the High Court in the afternoon of the 13th of August last, eloquent tributes were paid to Mr. Ray's memory by representatives of different branches of the legal profession.

Dr. Dwarka Nath Mitter, on behalf of the Vakils Association, said :—"It is with a heavy heart that I have to announce to your

Lordships, the melancholy news of the death of Mr. Mohendra Nath Ray a very distinguished and well-known Advocate of this Court. After a brief illness extending over a month Mr Ray passed away at about 8-30 this morning. Mr. Ray was born in 1862. After a brilliant career at the University, Mr. Ray joined the High Court Bar in the year 1880. After a period of struggle by dint of merit he rose to the front rank of the profession, and was, at the time of his death, the recognised leader of the Bar in its Civil Appellate Side. He acquired fame for his high forensic abilities and deep legal learning. He was fair to his opponents and he was fair to the Court. As a man his remarkable geniality and affability of disposition endeared him to every one. He was a true gentleman in every sense of the term. He was a man of wide culture and he could look beyond the narrow groove of professional life. His life was one of varied activities. He rendered services to his country in several capacities. He took very great interest in matters of education. He was a member of the Senate of the Calcutta University since 1891 when the elective system was for the first time introduced having been elected time after time by the graduates of the University who reposed implicit confidence in him. He was a member of the Syndicate of the Calcutta University since 1910 and was the Dean of the Faculty of law. He was the first non-official Chairman of the Howrah Municipality. For a very large number of years, he served as the Vice-Chairman of the District Board of Howrah and it was in recognition of his services in this behalf that the Government conferred upon him the Order of the Companionship of the Indian Empire in the year 1914. He was for several years an elected member of the Bengal Legislative Council in the pre-Reform days. He has left behind him two sons the eldest of whom is Mr. Manmatha Nath Ray an advocate of this Court who is well known to your Lordships. By the death of Mr. Mahendra Nath Ray the Vakils Association has lost its distinguished President, the legal profession, one of its brightest ornaments, and the country one of its most useful citizens."

Mr. B. L. Mitter, acting Advocate General on behalf of the Bar Association said that he shared the same feelings with Dr. Mitter, at the sudden death of Mr. Mohendra Nath Ray. Only a short time ago they assembled in that Court room, to mourn the loss of another distinguished member of the Bar, the late Mr. Surendra Nath Sen, and on that occasion, Babu Mohendra Nath Ray voiced the feelings of the legal profession. But it is a most mournful event and Mr. Mitter hardly hoped that so soon after that

event they would assemble there again to mourn the loss of Mohendra Nath Ray. Mr. Ray was a distinguished Advocate ; and his abilities found a wide scope. He was elected Chairman of the Howrah Municipality and Vice-Chairman of the Howrah District Board. In fact, he was a most prominent citizen in the district of Howrah. His University career was a very brilliant one and in fact he topped the list in every examination from the Matriculation to the Master of Arts. His brilliancy did not stop there, because, even after he had severed his connection with the University as student he served his "alma mater" in various capacities. He was a Dean of the Faculty of Law : he was a member of the Senate and was in various other capacities. In the Legislative Council he was a very prominent member. In the Council Chamber he spoke very rarely but whenever he spoke his impressive and incisive speeches immediately commanded attention of the House. As a man, he was a fine gentleman. The legal profession as well as the country will long remember the services to them, and will mourn his loss.

Babu Mohini Mohan Chatterjee President of the Incorporated Law Society, said that he associated himself with what his previous speakers said about the late Mr. Mohendra Nath Ray.

The Acting Chief Justice said :—

"Dr. Dwarkanath Mitter, Mr. Advocate-General and Mr. Mohini Mohan Chatterjee, my colleagues and I are deeply grieved at the death of Mr. Mohendra Nath Ray this morning. To all of you who knew Mr. Ray so well I need not say much but I desire to take this opportunity of giving an expression to our deep sense of the loss caused by his death. For nearly 40 years Mr. Ray was a well-known figure in this Court, which he joined in 1886 as a Vakil after an academic career of exceptional brilliance. A very able and learned lawyer and a distinguished advocate, he won the confidence and esteem of both the Bench and the Bar and lived up to the highest ideal of professional integrity. He commanded a very extensive practice and was one of the leaders of the profession on the appellate side. He was always very fair in his advocacy, and it was a pleasure to listen to his arguments at the Bar, which were always clear, concise and cogent. His death is a real loss to the Court and to the Profession.

"Mr. Ray did not allow his talents to be engrossed solely by the occupation of the law. He was a distinguished scholar in Mathematics and a man of wide culture, and was a prominent figure in the University of Calcutta of which he was an elected Fellow from 1891

onwards. Latterly, he was the Dean of the Faculty of Law. He was the first non-official elected Chairman of the Howrah Municipality, and for many years Vice-Chairman of the District Board of Howrah. In all these capacities he rendered public service of a high order. In 1914, as you know, Government conferred on him the honour of a Companionship of the Indian Empire.

"Mr. Ray was one of the most lovable of men, sincere and simple in habits, and was liked by every one who came into contact with him. I consider his death as a personal loss.

"I hope, Dr. Mitter, you will kindly convey the sympathy of my learned brothers and myself to Babu Manmatha Nath Ray and the other members of the bereaved family in the great loss they have suffered."

The Calcutta Law Journal.

THE JUDICIAL COMMITTEE RULES, 1925.

At the Court at Buckingham Palace, the 2nd day of May, 1925.

PRESENT,

The King's Most Excellent Majesty.

• Lord President.

Chancellor of the Duchy of

Lord Chamberlain

Lancaster.

Sir George Lloyd.

Whereas there was this day read at the Board a representation from the Judicial Committee of the Privy Council in the words following, viz. :—

“ The Lords of the Judicial Committee having taken into consideration the Practice and Procedure in accordance with which the general Appellate Jurisdiction of Your Majesty in Council is now exercised and being of opinion that the Rules regulating the said Practice and Procedure ought to be amended Their Lordships do hereby agree humbly to recommend to Your Majesty that with a view to such amendment certain Orders in Council regulating the said Practice and Procedure, viz., the Orders in Council dated respectively the 21st day of December, 1908, (a) the 23rd day of May, 1916, (b) the 25th day of March, 1920, (c) the 5th day of March, 1921, (d) and the 15th day of March, 1922, (e) amending the said Practice and Procedure ought to be revoked as from the 1st day of January, 1926, and that the several Rules hereunto annexed ought to be substituted therefor and ought to come into operation on that date.”

His Majesty having taken the said representation into consideration was pleased, by and with the advice of His Privy Council, to approve thereof and to order, as it is hereby ordered, that the said Orders in Council in the said representation mentioned be and the

(a) S. R. & O. 1908, No. 1288.

(b) S. R. & O. 1919, No. 1810.

(c) S. R. & O. 1922, No. 789.

(d) S. R. & O. 1922, No. 278 (not printed in S. R. & O. form).

(e) S. R. & O. 1922, No. 279.

same are hereby revoked as from the 1st day of January, 1926, and that the Rules hereunto annexed be substituted therefor to come into operation on that date.

Whereof all persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. Hankey.

Interpretation.

1.—(1) In these Rules, unless the context otherwise requires :—

"Appeal" means an Appeal to His Majesty in Council ;

"Judgment" includes decree, order, sentence, or decision of any Court, Judge, or Judicial Officer ;

"Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal :

"Registrar" means the Registrar or other proper officer having the custody of the records in the Court appealed from ;

"Abroad" means the country or place where the Court appealed from is situate ;

"Agent" means a person qualified by virtue of Her late Majesty's Order in Council of the 6th March 1896 to conduct proceedings before His Majesty in Council on behalf of another ;

"Party" and all words descriptive of parties to proceedings before His Majesty in Council (such as "Petitioner," "Appellant," "Respondent") mean, in respect of all acts proper to be done by an Agent, the Agent of the party in question where such party is represented by an Agent ;

"Respondent" includes Intervener ;

"Month" means calendar month ;

Words in the singular shall include the plural, and words in the plural shall include the singular.

(2) Where by these Rules any step is required to be taken in England in connection with proceedings before His Majesty in Council, whether in the way of lodging a Petition or other document, entering an Appearance, lodging security, or otherwise, such step shall be taken in the Registry of the Privy Council, Downing Street, London.

Leave to appeal.

Leave to appeal generally.

2. All Appeals shall be brought either in pursuance of leave obtained from the Court appealed from, or, in the absence of such leave, in pursuance of special leave to appeal granted.

by his Majesty in Council upon a Petition in that behalf presented by the intending Appellant.

Special leave to appeal.

3. A Petition for special leave to appeal to His Majesty in Council shall state succinctly and clearly all such facts as it may be necessary to state in order to enable the Judicial Committee to advise His Majesty whether such leave ought to be granted, and shall be signed by the Counsel who attends at the hearing or by the party himself if he appears in person. The Petition shall deal with the merits of the case only so far as is necessary for the purpose of explaining and supporting the particular grounds upon which special leave to appeal is sought.

Form of Petition for special leave to appeal.

4. The Petitioner shall lodge at least five copies of his Petition for special leave to appeal together with the Affidavit in support thereof prescribed by Rule 50 hereinafter contained, and, unless a Caveat as prescribed by Rule 48 has been lodged by the other parties who appeared in the Court below, an Affidavit of service of notice of the intended application upon such parties or their Solicitors or Agents, either abroad or in England.

Five copies of Petition to be lodged together with Affidavits in support.

5. A Petition for special leave to appeal may be lodged at any time after the date of the judgment sought to be appealed from, but the Petitioner shall, in every case, lodge his Petition with the least possible delay.

Time for lodging Petition.

6. Where the Judicial Committee agree to advise His Majesty to grant special leave to appeal, they shall, in their Report, specify the amount of the security for costs (if any) to be lodged by the Petitioner, and shall, unless the circumstances of a particular case render such a course unnecessary, provide for the transmission of the Record by the Registrar to the Registrar of the Privy Council and for such further matters as the justice of the case may require. Unless otherwise ordered the security shall be lodged at any time before the Appellant enters an Appearance.

Security for costs and transmission of Record.

7. Save as by the four last preceding Rules otherwise provided, the provisions of Rules 47 to 50 and 52 to 59 (all inclusive) hereinafter contained shall apply *mutatis mutandis* to Petitions for special leave to appeal.

General Provisions.

8. Rules 3 to 7 (both inclusive) shall apply *mutatis mutandis* to Petitions for leave to appeal *in forma pauperis*, but in addition to the Affidavits referred to in Rule 4 every such Petition shall be accompanied by an Affidavit from the Petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his

Petitions for special leave to appeal *in forma pauperis*.

interest in the subject-matter of the intended Appeal, and that he is unable to provide sureties, and also by a certificate of Counsel that the petitioner has reasonable ground of appeal.

Exemption of pauper Appellant from lodging security and paying Office fees.

9. Where a petitioner obtains leave to appeal *in forma pauperis*, he shall not be required to lodge security for the costs of the Respondent or to pay any Council Office fees.

Exemption of unsuccessful Petitioner for leave to appeal *in forma pauperis* from payment of Office fees.

10. A Petitioner whose Petition for leave to appeal *in forma pauperis* is dismissed may, notwithstanding such dismissal, be excused from paying the Council Office fees usually chargeable to a Petitioner in respect of a Petition for leave to appeal, if His Majesty in Council, on the advice of the Judicial Committee, shall think fit so to order.

Record and Appearance by Appellant.

Record to be transmitted without delay.

11. As soon as the Appeal has been admitted, whether by an Order of the Court appealed from or by an Order of His Majesty in Council granting special leave to appeal, the Appellant shall without delay take all necessary steps to have the Record transmitted to the Registrar of the Privy Council, and the Registrar shall, with all convenient speed, certify to the Registrar of the Privy Council that the Respondent has received notice, or is otherwise aware, of the Order of the Court appealed from Admitting the Appeal, or of the Order of His Majesty in Council giving the Appellant special leave, to appeal, and has also received notice, or is otherwise aware, of the despatch of the Record to England. Where an Appellant who has obtained special leave to appeal by an Order of His Majesty in Council fails to have the Record transmitted to the Registrar of the Privy Council with due diligence, the Registrar of the Privy Council shall call upon the Appellant to explain his default, and if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar insufficient, the said Registrar may issue a Summons to the Appellant calling upon him to show cause before the Judicial Committee at a time to be named in the said Summons why the special leave to appeal granted should not be rescinded. The Respondent shall be entitled to be heard before the Judicial Committee in the matter of the said Summons and to ask for his costs and such other relief as he may be advised. The Judicial Committee may, after considering the matter of the said Summons, recommend to His Majesty to rescind the grant of special leave to appeal or give such other directions therein as the justice of the case may require.

Printing of Record.

12. The Record shall be printed in accordance with the Rules

contained in Schedule A hereto. It may be printed either abroad or in England. When printed abroad the parties in England shall, upon perusal, consider whether the order of the documents is in accordance with these Rules, and if it is not, they shall agree upon the proper order. The Appellant shall then re-arrange copies of the Record for the use of the Judicial Committee and the other parties. In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the Privy Council who, if he thinks fit, may require the parties to attend before the Judicial Committee for directions.

13. Where the Record is printed abroad, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council 40 copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof and by affixing thereto the seal, if any, of the Court appealed from.

Number of copies to be transmitted, where Record printed abroad.

14. Where the Record is to be printed in England, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council one certified copy of such Record, together with an index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

One certified copy to be transmitted, where Record to be printed in England.

15. Where part of the Record is printed abroad and part is to be printed in England, Rules 13 and 14 shall, as far as practicable, apply to such parts as are printed abroad and such as are to be printed in England respectively.

Record printed partly abroad, partly in England.

16. The reasons given by the judge, or any of the judges, for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises, shall by such judge or judges be communicated in writing to the Registrar and shall be included in the Record.

Reasons for judgments to be included.

17. The Registrar, as well as the parties and their Agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the Appeal, and, generally, to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be printed or copied shall be enumerated in a type-written list to be transmitted with the Record.

Exclusion of unnecessary documents from Record.

18. Where in the course of the preparation of a Record one

Documents object-

ed to be indicated. party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the Record, as finally printed (whether abroad or in England), shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

Registration and numbering of Records.

19. As soon as the Record is received in the Registry of the Privy Council, it shall be registered in the said Registry, with the date of arrival, the names of the parties, and the description whether "printed" or "written." A Record, or any part of a Record, not printed in accordance with the Rules contained in Schedule A hereto shall be treated as written. Appeals shall be numbered consecutively in each year in the order in which the Records are received in the said Registry.

Inspection of Record by parties.

20. The parties shall be entitled to inspect the Record and to extract all necessary particulars therefrom for the purpose of entering an Appearance.

Appearance by Appellant.

21. The Appellant shall enter an Appearance before taking any step in the prosecution of the Appeal, and after entering such Appearance, shall forthwith give notice thereof to the Respondent, if the latter has entered an Appearance.

Times within which a copy of a written Record shall be bespoken.

22. Where the Record arrives in England either wholly written, or partly written and partly printed, the Appellant shall, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B hereto, and within a period of two months from the same date in the case of Appeals from any other Courts, enter an Appearance and bespeak a typewritten copy of the Record, or of such parts thereof as it may be necessary to have copied, and shall engage to pay the cost of preparing such copy at the following rates per folio typed (exclusive of tabular matter)—
2d. per folio of English matter, 2½d. per folio of Indian matter, and 3½d. per folio of foreign matter; and shall also engage to pay at such price as shall be fixed by the Registrar of the Privy Council the cost of printing at least 50 copies thereof.

Preparation of copy of Record for printer.

23. As soon as the Appellant has obtained the typewritten copy of the Record bespoken by him, he shall proceed, with due diligence, to arrange the documents in suitable order, to check the index, to insert marginal notes and check the same with the index, and, generally, to do whatever may be required for the purpose

of preparing the copy for the printer, in accordance with the Rules contained in Schedule A hereto, and shall, if the Respondent has entered an Appearance, submit the copy, as prepared for the printer, to the Respondent for his approval. In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the Privy Council who, if he thinks fit, may require the parties to attend before the Judicial Committee for directions.

24. As soon as the typewritten copy of the Record is ready for the printer, the Appellant shall lodge it in the Registry of the Privy Council for printing by a printer selected by the Registrar of the Privy Council, and at the same time shall lodge the amount of the estimated cost of printing the Record.

Lodging copy of Record for printing

25. Whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the parties, with the sanction of the Registrar of the Privy Council, may submit such question of law to the Judicial Committee in the form of a Special Case, and print such parts only of the Record as may be necessary for the discussion of the same Provided that nothing herein contained shall in any way prevent the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit, and that, in order to promote such arrangements and simplification of the matter in dispute, the said Registrar may call the parties before him, and having heard them, and examined the Record, may report to the Judicial Committee as to the nature of the proceedings.

Special Case

26. The Registrar of the Privy Council shall, as soon as the proof prints of the Record are ready, give notice to all parties who have entered an Appearance requesting them to attend at the Registry of the Privy Council at a time to be named in such notice in order to examine the said proof prints and compare the same with the certified Record, and shall, for that purpose, furnish each of the said parties with one proof print. After the examination has been completed, the Appellant shall, without delay, lodge his proof print, duly corrected and (so far as necessary) approved by the Respondent, and the Registrar of the Privy Council shall thereupon cause the copies of the Record to be struck off from such proof print.

Examination of proof of Record and striking off copies.

27. Each party who has entered an Appearance shall be entitled to receive, for his own use, six copies of the Record.

Number of copies of Record for parties

28. Subject to any special direction from the Judicial Committee to the contrary, the costs of and incidental to the printing

How costs of printing Record are to be borne.

of the Record shall form part of the costs of the Appeal, but the costs of and incidental to the printing of any document objected to by one party, in accordance with Rule 18, shall, if such document is found on the taxation of costs to be unnecessary or irrelevant, be disallowed to, or borne by, the party insisting on including the same in the Record.

Petition of Appeal

Times within which
Petition shall be
lodged.

29. The Appellant shall lodge his Petition of Appeal.—

(a) Where the Record arrives in England printed, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B hereto, and within a period of two months from the same date in the case of Appeals from any other Courts ;

(b) Where the Record arrives in England written, within a period of one month from, but not before, the date of the completion of the printing thereof :

Provided that nothing in this Rule contained shall preclude the Appellant from lodging his Petition of Appeal prior to the arrival of the Record, or the completion of the printing thereof, if there are special reasons why, in the opinion of the Registrar of the Privy Council, it should be desirable for him to do so.

Form of Petition.

30. The Petition of Appeal shall be lodged in the Form prescribed by Rule 47 hereinafter contained. It shall recite succinctly and, as far as possible in chronological order the principal steps in the proceedings leading up to the Appeal from the commencement thereof down to the admission of the Appeal but shall not contain argumentative matter or travel into the merits of the case.

Service of Petition.

31. The Appellant shall, after lodging his Petition of Appeal, serve a copy thereof without delay on the Respondent, as soon as the latter has entered an Appearance, and shall endorse such copy with the date of the lodgment.

Withdrawal of Appeal.

Withdrawal of
Appeal before
Petition of Appeal
has been lodged.

32. Where an Appellant, who has not lodged his petition of Appeal, desires to withdraw his appeal, he shall give notice in writing to that effect to the Registrar of the Privy Council, and the said Registrar shall, with all convenient speed after the receipt of such notice, by letter notify to the Registrar of the Court appealed from that the Appeal has been withdrawn and the said Appeal shall thereupon stand dismissed as from the date of the said letter without further Order.

33. Where an Appellant, who has lodged his Petition of Appeal, desires to withdraw his Appeal, he shall present a Petition to that effect to His Majesty in Council. On the hearing of any such Petition a Respondent who has entered an Appearance in the Appeal shall, subject to any agreement between him and the Appellant to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the Respondent has not entered an Appearance, or, having entered an Appearance, consents in writing to the prayer of the Petition, the Petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of Rule 56 hereinafter contained.

Withdrawal of Appeal after Petition of Appeal has been lodged.

Non-Prosecution of Appeal.

34. Where an Appellant takes no step in prosecution of his Appeal within a period of four months from the date of the arrival of the Record in England in the case of an Appeal from a Court situate in any of the countries or places named in Schedule B. hereto, or within a period of two months from the same date in the case of an Appeal from any other Court, the Registrar of the Privy Council shall, with all convenient speed, by letter notify the Registrar of the Court appealed from that the Appeal has not been prosecuted, and the Appeal shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further Order, and a copy of the said letter shall be sent by the Registrar of the Privy Council to any Respondent who has entered an Appearance in the Appeal.

Dismissal of Appeal where Appellant takes no step in prosecution thereof.

35. Where an Appellant who has entered an Appearance—

(a) fails to bespeak a copy of a written Record, or of part of a written Record, in accordance with, and within the periods prescribed by, Rule 22; or

Dismissal of Appeal for non-prosecution after Appellant's Appearance and before lodgment of Petition of Appeal.

(b) having bespoken such copy within the periods prescribed by Rule 22, fails thereafter to proceed with due diligence to take all such further steps as may be necessary for the purpose of completing the printing of the said Record; or

(c) fails to lodge his Petition of Appeal within the periods respectively prescribed by Rule 29;

the Registrar of the Privy Council shall call upon the Appellant to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall, with all convenient speed, by letter notify the Registrar of the Court appealed from that the Appeal has not been effectually prosecuted, and the Appeal

shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further Order, and a copy of the said letter shall be sent by the Registrar of the Privy Council to all the parties who have entered an Appearance in the Appeal.

Dismissal of Appeal for non-prosecution after lodgment of Petition of Appeal.

36. Where an Appellant, who has lodged his Petition of Appeal, fails thereafter to prosecute his Appeal with due diligence, the Registrar of the Privy Council shall call upon him to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall issue a Summons to the Appellant calling upon him to show cause before the Judicial Committee at a time to be named in the said Summons why the Appeal should not be dismissed for non-prosecution. Provided that no such Summons shall be issued by the said Registrar before the expiration of one year from the date of the arrival of the Record in England. If the Respondent has entered an Appearance in the Appeal, the Registrar of the Privy Council shall send him a copy of the said Summons, and the Respondent shall be entitled to be heard before the Judicial Committee in the matter of the said Summons at the time named and to ask for his costs and such other relief as he may be advised. The Judicial Committee may, after considering the matter of the said Summons, recommend to His Majesty the dismissal of the Appeal for non-prosecution, or give such other directions therein as the justice of the case may require.

Restoring an Appeal dismissed for non-prosecution.

37. An Appellant whose Appeal has been dismissed for non-prosecution may present a Petition to His Majesty in Council praying that his Appeal may be restored.

Appearance by Respondent.

Time within which Respondent may appear.

38. The Respondent may enter an Appearance at any time between the arrival of the Record and the hearing of the Appeal, but if he unduly delays entering an Appearance he shall bear, or be disallowed, the costs occasioned by such delay, unless the Judicial Committee otherwise direct.

Notice of Appearance by Respondent.

39. The Respondent shall forthwith after entering an Appearance give notice thereof to the Appellant, if the latter has entered an Appearance.

Form of Appearance where all the Respondents do not appear.

40. Where there are two or more Respondents, and only one, or some, of them enter an Appearance, the Appearance Form shall set out the names of the appearing Respondents.

41. Two or more Respondents may, at their own risk as to costs, enter separate Appearances in the same Appeal.

Separate
Appearances.

42. A Respondent who has not entered an Appearance shall not be entitled to receive any notice relating to the Appeal from the Registrar of the Privy Council, nor be allowed to lodge a Case in the Appeal.

Non-appearing
Respondent not
entitled to receive
notices or lodge
Case.

43. Where a Respondent fails to enter an Appearance in an Appeal, the following Rules shall, subject to any special Order of the Judicial Committee to the contrary, apply :

Procedure on non-
appearance of
Respondent.

(a) If the non-appearing Respondent was a Respondent at the time when the Appeal was admitted, whether by the Order of the Court appealed from or by an Order of His Majesty in Council giving the Appellant special leave to appeal, and it appears from the terms of the said Order, or Order in Council, or otherwise from the Record, or from a Certificate of the Registrar of the Court appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware, of the Order of the Court appealed from admitting the appeal, or of the Order of His Majesty in Council giving the Appellant special leave to appeal, and has also received notice, or was otherwise aware, of the despatch of the Record to England, the appeal may, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date of the lodging of the Petition of Appeal :

(b) if the non-appearing Respondent was made a Respondent by an Order of His Majesty in Council subsequently to the admission of the Appeal, and it appears from the Record, or from a Supplementary Record, or from a Certificate of the Registrar of the Court appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware, of any intended application to bring him on the record as a Respondent, the Appeal may, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date on which he shall have been served with a copy of His Majesty's Order in Council bringing him on the Record as a Respondent :

Provided that where it is shown to the satisfaction of the Registrar of the Privy Council, by Affidavit or otherwise, either that an Appellant has made every reasonable endeavour to serve a non-appearing Respondent with the notices mentioned in clause (a) and (b) respectively and has failed to effect such service, or

that it is not the intention of the non-appearing Respondent to enter an Appearance to the Appeal, the Appeal may, without further Order in that behalf and at the risk of the Appellant, be proceeded with *ex parte* as against the said non-appearing Respondent.

Respondent
defending Appeal
in *forma pauperis*.

44. A Respondent who desires to defend an Appeal *in forma pauperis* may present a petition to that effect to His Majesty in Council, which Petition shall be accompanied by an Affidavit from the Petitioner stating that he is not worth £25 in the world, excepting his wearing apparel and his interest in the subject-matter of the Appeal.

Petitions generally.

Mode of addressing
Petitions.

45. All Petitions for orders or directions as to matters of practice or procedure arising after the lodging of the Petition of Appeal and not involving any change in the parties to an Appeal shall be addressed to the Judicial Committee. All other Petitions shall be addressed to His Majesty in Council, but a Petition which is properly addressed to His Majesty in Council may include, as incidental to the relief thereby sought, a prayer for orders or directions as to matters of practice or procedure.

Orders on Petitions
which need not be
drawn up.

46. Where an Order made by the Judicial Committee does not embody any special terms or include any special directions, it shall not be necessary to draw up such Order, unless the Committee otherwise direct, but a Note thereof shall be made by the Registrar of the Privy Council.

Form of Petition
and number of
copies to be lodged.

47. All petitions shall consist of paragraphs numbered consecutively and shall be written, typewritten, or lithographed, on brief paper with quarter margin and endorsed with the name of the Court appealed from, the full title and Privy Council number of the Appeal to which the petition relates or the full title of the Petition (as the case may be), and the name and address of the London Agent (if any) of the Petitioner, but need not be signed, except as provided by Rule 3. Unless the Petition is a Consent Petition within the meaning of Rule 56 at least five copies thereof shall be lodged.

Caveat.

48. Where a Petition is expected to be lodged, or has been lodged, which does not relate to any pending Appeal of which the Record has been registered in the Registry of the Privy Council, any person claiming a right to appear before the Judicial Committee on the hearing of such Petition may lodge a Caveat in the matter thereof, and shall thereupon be entitled to receive from the Registrar

of the Privy Council notice of the lodging of the Petition, if at the time of the lodging of the Caveat such Petition has not yet been lodged; and, if and when the Petition has been lodged, to require the Petitioner to serve him with a copy of the Petition, and to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition. The Caveator shall forthwith after lodging his Caveat give notice thereof to the Petitioner, if the Petition has been lodged.

49. Where a Petition is lodged in the matter of any pending Appeal of which the Record has been registered in the Registry of the Privy Council, the Petitioner shall serve any party who has entered an Appearance in the Appeal with a copy of such Petition, and the party so served shall thereupon be entitled to require the Petitioner to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition.

Service of Petition.

50. A Petition not relating to any Appeal of which the Record has been registered in the Registry of the Privy Council, and any other Petition containing allegations of fact which cannot be verified by reference to the registered Record or any certificate or duly authenticated statement of the Court appealed from, shall be supported by Affidavit. Where the Petitioner prosecutes his Petition in person, the said Affidavit shall be sworn by the Petitioner himself and shall state that, to the best of the deponent's knowledge, information, and belief, the allegations contained in the Petition are true. Where the Petitioner is represented by an Agent, the said Affidavit shall be sworn by such Agent and shall, besides stating that, to the best of the deponent's knowledge, information, and belief, the allegations contained in the Petition are true, show how the deponent obtained his instructions and the information enabling him to present the Petition.

Verifying Petition
by Affidavit.

51. A Petition for an Order of Revivor or Substitution shall be accompanied by a certificate or duly authenticated statement from the Court appealed from showing who, in the opinion of the said Court, is the proper person to be substituted, or entered, on the Record in place of, or in addition to, a party who has died or undergone a change of status.

Petition for Order
of Revivor or
Substitution.

52. The Registrar of the Privy Council may refuse to receive a Petition on the grounds that it discloses no reasonable cause of appeal, or is frivolous, or contains scandalous matter, but the Petitioner may appeal, by way of motion, from such refusal to the Judicial Committee.

Petition disclosing
no reasonable cause
of appeal or con-
taining scandalous
matter to be
refused.

Setting down
Petition.

53. As soon as a Petition and all necessary documents are lodged the Petition shall thereupon be deemed to be set down.

Times within
which set-down
Petitions shall be
heard.

54. On each day appointed by the Judicial Committee for the hearing of Petitions the Registrar of the Privy Council shall, unless the Committee otherwise direct, put in the paper for hearing all such Petitions as have been set down. Provided that, in the absence of special circumstances of urgency to be shown to the satisfaction of the said Registrar, no Petition, if opposed, shall be put in the paper for hearing before the expiration of ten clear days from the lodging thereof, unless the Opponent consents to the Petition being put in the paper on an earlier day.

Notice to parties
of day fixed for
hearing Petition.

55. Subject to the provisions of the next following Rule, the Registrar of the Privy Council shall, as soon as the Judicial Committee have appointed a day for the hearing of a Petition, notify all parties concerned by Summons of the day so appointed.

Procedure where
Petition is consent-
ed to or is formal.

56. Where the prayer of a Petition is consented to in writing by the opposite party, or where a Petition is of a formal and non-contentious character, the Judicial Committee may, if they think fit, make their Report to His Majesty on such Petition, or make their Order thereon, as the case may be, without requiring the attendance of the parties in the Council Chamber, and the Registrar of the Privy Council shall not in any such case issue the Summons provided for by the last-preceding Rule, but shall with all convenient speed after the Committee have made their Report or Order notify the parties that the Report or Order has been made and of the date and nature of such Report or Order.

Withdrawal of
Petition.

57. A Petitioner who desires to withdraw his Petition shall give notice in writing to that effect to the Registrar of the Privy Council. Where the Petition is opposed, the Opponent shall, subject to any agreement between the parties to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the Petition is unopposed, or where, in the case of an opposed Petition, the parties have come to an agreement as to the costs of the Petition, the Petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of the last-preceding Rule.

Procedure where
hearing of Petition
unduly delayed.

58. Where a Petitioner unduly delays bringing a Petition to a hearing, the Registrar of the Privy Council shall call upon him to explain the delay, and if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar may, after notifying all parties interested by Summons of his intention to do so, put the Petition in the

paper for hearing on the next following day appointed by the Judicial Committee for the hearing of Petition for such directions as the Committee may think fit to give thereon.

- 59. At the hearing of a Petition not more than one Counsel shall be admitted to be heard on a side.

• Only one Counsel heard on a side in Petitions.

Case.

- 60. No party to an Appeal shall be entitled to be heard by the Judicial Committee unless he has previously lodged his Case in the Appeal. Provided that where a Respondent who has entered an Appearance does not desire to lodge a Case in the Appeal, he may give the Registrar of the Privy Council notice in writing of his intention not to lodge any Case, while reserving his right to address the Judicial Committee on the question of costs.

Lodging of Case.

- 61. The case may be printed either abroad or in England, and shall, in either event, be printed in accordance with the Rules I. to III. contained in Schedule A hereto, every tenth line thereof being numbered in the margin, and shall be signed by at least one of the Counsel who attends at the hearing of the Appeal or by the party himself if he conducts his Appeal in person.

Printing of Case.

- 62. Each party shall lodge 30 prints of his Case.

Number of prints to be lodged.

- 63. The Case shall consist of paragraphs numbered consecutively and shall state, as concisely as possible, the circumstances out of which the Appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the Record as printed shall, as far as practicable, be printed in the margin, and care shall be taken to avoid, as far as possible, the reprinting in the Case of long extracts from the Record. The Taxing Officer, in taxing the costs of the Appeal, shall, either of his own motion, or at the instance of the opposite party, inquire into any unnecessary prolixity in the Case, and shall disallow the costs occasioned thereby.

Form of Case.

- 64. Two or more Respondents may, at their own risk as to costs, lodge separate Cases in the same Appeal.

Separate Cases by two or more Respondents.

- 65. Each party shall, after lodging his Case, forthwith give notice thereof to the other party.

Notice of lodgment of Case.

- 66. Subject as hereinafter provided, the party who lodges his Case first may, at any time after the expiration of three clear days from the day on which he has given the other party the notice prescribed by the last-preceding Rule, serve such other party, if the latter has not in the meantime lodged his Case,

Case Notice.

with a "Case Notice," requiring him to lodge his Case within one month from the date of the service of the said Case Notice and informing him that, in default of his so doing, the Appeal will be set down for hearing *ex parte* as against him, and if the other party fails to comply with the said Case Notice, the party who has lodged his Case may, at any time after the expiration of the time limited by the said Case Notice for the lodging of the Case, lodge an Affidavit of Service (which shall set out the terms of the said Case Notice), and the Appeal shall thereupon, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the party in default. Provided that no Case Notice shall be served until after the completion of the printing, or re-arrangement under Rule 12, of the Record, and also that nothing in this Rule contained shall preclude the party in default from lodging his Case, at his own risk as regards costs and otherwise, at any time up to the date of hearing.

Setting down
Appeal and
exchanging Cases.

57. Subject to the provisions of Rule 43 and of the last preceding Rule, an Appeal shall be set down *ipso facto* as soon as the Cases on both sides are lodged, and the parties shall thereupon exchange Cases by handing one another, either at the Offices of one of the Agents or in the Registry of the Privy Council, ten copies of their respective Cases.

Binding Records, &c.

Mode of binding
Records, &c., for
use of Judicial
Committee.

68. As soon as an Appeal is set down, the Appellant shall attend at the Registry of the Privy Council and obtain ten copies of the Record and Cases to be bound for the use of the Judicial Committee at the hearing. The copies shall be bound in cloth or in half leather with paper sides, and six leaves of blank paper shall be inserted before the Appellant's Case. The front cover shall bear a printed label stating the title and Privy Council number of the Appeal, the contents of the volume, and the names and addresses of the London Agents. The several documents, indicated by incuts, shall be arranged in the following order: (1) Appellant's Case; (2) Respondent's Case; (3) Record (if in more than one part showing the separate parts by incuts, all parts being paged at the top of the page); (4) Supplemental Record (if any); and the short title and Privy Council number of the Appeal shall also be shown on the back.

Time within which
bound copies shall
be lodged.

69. The Appellant shall lodge the bound copies not less than four clear days before the commencement of the Sittings during which the Appeal is to be heard.

Hearing.

70. The Registrar of the Privy Council shall name a day on or before which Appeals must be set down if they are to be entered in the List of Business for the ensuing Sittings. All Appeals set down on or before the day named shall, subject to any directions from the Committee or to any agreement between the parties to the contrary, be entered in such List of Business and shall, subject to any directions from the Committee to the contrary, be heard in the order in which they are set down.

Notice of day on or before which Appeals must be set down for ensuing Sittings.

71. The Registrar of the Privy Council shall, subject to the provisions of Rule 42, notify the parties to each Appeal by Summons, at the earliest possible date, of the day appointed by the Judicial Committee for the hearing of the Appeal, and the parties shall be in readiness to be heard on the day so appointed.

Notice to parties of day fixed for hearing Appeal.

72. At the hearing of an Appeal not more than two Counsel shall be admitted to be heard on a side.

Only two Counsel heard on a side in Appeals.

73. In Admiralty Appeals the Judicial Committee may, if they think fit, require the attendance of two Nautical Assessors.

Nautical Assessors.

Judgment.

74. Where the Judicial Committee, after hearing an Appeal, decide to reserve their Judgment thereon, the Registrar of the Privy Council shall in due course notify the parties by Summons of the day appointed by the Committee for the delivery of the Judgment.

Notice to parties of day fixed for delivery of Judgment.

Costs.

75. All Bills of Costs under the Orders of the Judicial Committee on Appeals, Petitions, and other matters, shall be referred to the Registrar of the Privy Council, or such other person as the Judicial Committee may appoint, for taxation, and all such taxations shall be regulated by the Schedule of Fees set forth in Schedule C. hereto.

Taxation of costs.

76. The taxation of costs in England shall be limited to costs incurred in England.

What costs taxed in England.

77. The Registrar of the Privy Council shall, with all convenient speed after the Judicial Committee have given their decision as to the costs of an Appeal, Petition, or other matter, issue to the party to whom costs have been awarded an Order to tax and a Notice specifying the day and hour appointed by

Order to tax.

him for taxation. The party receiving such Order to tax and Notice shall, not less than 48 hours before the time appointed for taxation, lodge his Bill of Costs (together with all necessary vouchers for disbursements), and serve the opposite party with a copy of his Bill of Costs and of the Order to tax and Notice.

Power of Taxing Officer where taxation delayed through the fault of the party whose costs are to be taxed.

78. The Taxing Officer may, if he think fit, disallow to any party who fails to lodge his Bill of Costs (together with all necessary vouchers for disbursements) within the time prescribed by the last-preceding Rule, or who in any way delays or impedes a taxation, the charges to which such party would otherwise be entitled for drawing his Bill of Costs and attending the taxation.

Appeal from decision of Taxing Officer.

79. Any party aggrieved by a taxation may appeal from the decision of the Taxing Officer to the Judicial Committee. The Appeal shall be heard by way of motion, and the party appealing shall give three clear days' Notice of Motion to the opposite party, and shall also leave a copy of such Notice in the Registry of the Privy Council.

Amount of taxed costs to be inserted in His Majesty's Order in Council.

80. The amount allowed by the Taxing Officer on the taxation shall, subject to any appeal from his taxation to the Judicial Committee and subject to any direction from the Committee to the contrary, be inserted in His Majesty's Order in Council determining the Appeal or Petition.

Taxation on the pauper scale.

81. Where the Judicial Committee directs costs to be taxed on the pauper scale, the Taxing Officer shall not allow any fees of Counsel, and shall only award to the Agents out-of-pocket expenses and a reasonable allowance to cover office expenses, such allowance to be taken at about three-eighths of the usual professional charges in ordinary Appeals. Such pauper scale shall apply to and include the application upon which leave to appeal in *forma pauperis* was granted.

Security to be dealt with as His Majesty's Order in Council determining Appeal directs.

82. Where the Appellant has lodged security for the Respondent's costs of an Appeal in the Registry of the Privy Council, the Registrar of the Privy Council shall deal with such security in accordance with the directions contained in His Majesty's Order in Council determining the Appeal.

Miscellaneous.

Power of Judicial Committee to excuse from compliance with Rules.

83. The Judicial Committee may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules, and may give such directions in matters of practice and procedure as they shall consider just and expedient. Appli-

cations to be excused from compliance with the requirements of any of these Rules shall be addressed in the first instance to the Registrar of the Privy Council, who shall take the instructions of the Committee thereon and communicate the same to the parties. If, in the opinion of the said Registrar, it is desirable that the application should be dealt with by the Committee in open Court, he may direct the party applying to lodge in the Registry of the Privy Council, and to serve the opposite party with, a Notice of Motion returnable before the Committee.

83. Any document lodged in connection with an Appeal, Petition, or other matter pending before His Majesty in Council or the Judicial Committee, may be amended by leave of the Registrar of the Privy Council, but if the said Registrar is of opinion that an application for leave to amend should be dealt with by the Committee in open Court, he may direct the party applying to lodge in the Registry of the Privy Council, and to serve the opposite party with, a Notice of Motion returnable before the Committee.

Amendment of documents.

85. Affidavits relating to any Appeal, Petition, or other matter pending before His Majesty in Council or the Judicial Committee may be sworn before the Registrar of the Privy Council.

Affidavits may be sworn before the Registrar of the Privy Council.

86. Where a party to an Appeal, Petition, or other matter pending before His Majesty in Council changes his Agent, such party, or the new Agent, shall forthwith give the Registrar of the Privy Council and the outgoing Agent notice in writing of the change, and shall amend the Appearance accordingly. Until such notices are given the former Agent shall be considered the Agent of the party until the final conclusion of the Appeal, Petition, or other matter.

Change of Agent.

87. Subject to the provisions of any Statute or of any Statutory Rule or Order to the contrary, these Rules shall apply to all matters falling within the Appellate Jurisdiction of His Majesty in Council.

Scope of application of Rules.

88. These Rules may be cited as the Judicial Committee Rules, 1925, and they shall come into operation on the 1st day of January, 1926.

Mode of citation and date of operation.

Schedule A.

Rules as to Printing.

I. All Records and other proceedings in Appeals or other matters pending before His Majesty in Council or the Judicial Committee, which are required by the above Rules to be printed shall be printed in the form known as Demy Quarto.

II. The size of the paper used shall be such that the sheet, when folded and trimmed, will be 11 inches in height and $8\frac{1}{2}$ inches in width.

III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter, and notes. The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

IV. Records shall be arranged in two parts in the same volume, where practicable, viz :

Part I. The pleadings and proceedings, the transcript of the evidence of the witnesses, the Judgments, Decrees, &c, of the Courts below, down to the Order admitting the Appeal.

Part II. The exhibits and documents.

V. The Index to Part I shall be in chronological order, and shall be placed at the beginning of the volume.

The Index to Part II shall follow the order of the exhibit mark, and shall be placed immediately after the Index to Part I.

VI. Part I shall be arranged strictly in chronological order, i. e, in the same order as the index.

Part II shall be arranged in the most convenient way for the use of the Judicial Committee, as the circumstances of the case require. The documents shall be printed as far as suitable in chronological order, mixing Plaintiff's and Defendant's documents together when necessary. Each document shall show its exhibit mark, and whether it is a Plaintiff's or Defendant's document (unless this is clear from the exhibit mark) and in all cases documents relating to the same matter, such as

(a) a series of correspondence, or

(b) proceedings in a suit other than the one under appeal, shall be kept together. The order in the Record of the documents in Part II will probably be different from the order of the Index, and the proper page number of each document shall be inserted in the printed Index.

The parties will be responsible for arranging the Record in proper order for the Judicial Committee, and in difficult cases Counsel may be asked to settle it.

VII. The documents in Part I shall be numbered consecutively.

The documents in Part II shall not be numbered, apart from the exhibit mark.

VIII. Each document shall have a heading which shall consist of the number or exhibit mark and the description of the document in the Index, without the date.

IX. Each document shall have a marginal note which shall be repeated on each page over which the document extends, viz. :

Part I.

(a) Where the case has been before more than one Court, the short name of the Court shall first appear. Where the case has been before only one Court, the name of the Court need not appear.

(b) The marginal note of the document shall then appear consisting of the number and the description of the document in the Index, with the date, except in the case of oral evidence.

(c) In the case of oral evidence, "Plaintiff's evidence" or "Defendant's evidence" shall appear beneath the name of the Court, and then the marginal note consisting of the number in the Index and the witness's name, with "examination," "cross-examination," or "re-examination," as the case may be.

Part II.

The word "Exhibits" shall first appear.

The marginal note of the exhibit shall then appear consisting of the exhibit mark and the description of the document in the Index, with the date.

X. The parties shall agree to the omission of formal and irrelevant documents, but the description of the document may appear (both in the Index and in the Record), if desired, with the words "not printed" against it.

A long series of documents, such as accounts, rent rolls, inventories, &c., shall not be printed in full, unless Counsel so advise, but the parties shall agree to short extracts being printed as specimens.

XI. In cases where maps sent from abroad are of an inconvenient size or unsuitable in character, the Appellant shall, in agreement with the Respondent, prepare in England, from the materials sent from abroad, maps drawn properly to scale and of reasonable size, showing, as far as possible, the claims of the respective parties, in different colours.

*Schedule B.**Countries and places referred to in Rules 22, 29, and 34.*

Australia.
 British Honduras.
 British North Borneo.
 Brunei.
 Ceylon.
 China.
 Eastern African Dependencies.
 Falkland Islands.
 Federated Malay States.
 Fiji.
 Hong Kong.
 India.
 Mauritius.
 New Zealand.
 Persia.
 Seychelles.
 Somaliland Protectorate.
 Straits Settlements.

Schedule C.

I.

Fees allowed to Agents conducting Appeals or other matters before the Judicial Committee of the Privy Council.

(33 per cent. is added to these fees.)

	£	s.	d.
Retainer fee	0	13	4
Drawing Appearance or Caveat	0	5	0
Perusing printed Record, for every printed sheet of 8 pages	1	1	0
Perusing written Record, for every 25 folios	0	6	8
Drawing Index	0	2	0
Drawing Marginal Notes and Headings	0	0	6
Attending at the Registry to examine proof print of Record with the certified Record	3	3	0
		per half-day	1 11 6
Correcting revised print of Record, per sheet of 8 pages : Foreign or Indian cases	1	1	0
Other cases	0	10	6

			£.	s.	d.
Instruction for Petition or Motion, or to Oppose	...	...	0	10	0
Instructions for Petition of Appeal	...	...	0	10	0
Instructions for Case	...	...	1	0	0
Drawing Petition, Motion, Case or Affidavit	per folio	...	0	2	0
Copying Petition, Motion, Case or Affidavit	per folio	...	0	0	6
Correcting proof of Case, per sheet of 8 pages : Foreign					
or Indian cases	...	...	1	1	0
Other cases	...	...	0	10	6
Drawing and fair copy Case Notice	...	...	0	10	0
Perusing Petition, Motion, or Affidavit	per folio	...	0	2	0
Perusing Petition of Appeal	...	...	1	1	0
Perusing Case, per printed sheet of 8 pages	...	...	1	1	0
Instructions for and preparing Retainer to Counsel	...	...	0	10	0
Instructions to Counsel to argue an Appeal	...	...	1	0	0
Instructions to Counsel to argue a Petition or Motion...	...	...	0	10	0
Instructions to printer	...	...	0	10	0
Attending Consultation	...	...	1	0	0
Attending at the Council Chamber for the hearing of a					
Petition or Motion	...	...	1	6	8
Attending at the Council Chamber all day on an Appeal					
not called on	...	...	2	6	8
Attending the hearing of an Appeal	per day	...	3	6	8
Attending a Judgment	...	...	1	6	8
Approving draft Order	...	...	0	10	0
Attendances generally	...	...	0	10	0
Attendances on Counsel where fee is 30 guineas or over	...	...	1	0	0
Drawing Bill of Costs	per folio	...	0	1	0
Copying Bill of Costs	per folio	...	0	0	6
Attending Taxation of Costs of an Appeal	...	...	2	2	0
Attending Taxation of Costs of a Petition or Motion	...	...	1	1	0
Sessions Fee for each year or part of a year from the					
date of Appearance (in Appeals only)	...	...	3	3	0
Letters, &c. (in Petitions)	...	...	1	1	0
Letters, &c. (in Appeals) for 1st year	...	...	2	2	0
For each following year	...	...	1	1	0

II.

Council Office Fees.

			£.	s.	d.
Entering Appearance	...	...	1	0	0
Amending Appearance	...	...	0	10	0

Examining proof print of Record with the certified record at the Registry (chargeable to Appellant only)	£. s. d.
per day	2 0 0
per half-day	1 0 0
Lodging Petition of Appeal ...	3 0 0
Lodging Petition for special leave to appeal ...	2 0 0
Lodging any other Petition or Motion ...	1 0 0
Lodging Case or Notice under Rule 60 ...	2 0 0
Setting down Appeal (chargeable to Appellant only) ...	5 0 0
Setting down Petition for special leave to appeal (charge- able to Petitioner only) ...	2 0 0
Setting down any other Petition (chargeable to Petitioner only) ...	1 0 0
Summons ...	1 0 0
Committee Report on Petition...	2 0 0
Committee Report on Appeal...	3 0 0
Original Order of His Majesty in Council determining an Appeal ...	5 0 0
Any other original Order of His Majesty in Council ...	3 0 0
Plain copy of an Order of His Majesty in Council ...	0 5 0
Original Order of the Judicial Committee...	2 0 0
Plain copy of Committee Order ...	0 5 0
Lodging Affidavit ...	0 10 0
Certificate delivered to parties...	0 10 0
Lodging Caveat ...	1 0 0
Subpoena to witnesses ...	0 10 0
Taxing Fee 6d. for each pound allowed, or a fraction thereof, up to £300, and one per cent. beyond that sum, calculated at the rate of 5s. for each £25, or a portion thereof.	



The Calcutta Law Journal.

THE SPIRIT OF HINDU LAW.

As in the case of other institutions of ancient Hindu civilisation the history of the development of Hindu Law remains to be discovered and written. But unlike many other institutions of that civilisation we may be tolerably sure what the final result of that development was from the books on Hindu Law, the Smriti Samhitas and the Nibandhas or commentaries, which have come down to us. No doubt by far the greater number of these books, even of those which were once treated as authorities, have perished. The recent discovery of Visvarupa's famous commentary on Yajñavalkya rouses the hope that some may not have perished irretrievably. But this loss of treatises though it makes the task of tracing the gradual building up of Hindu Law well nigh impossible is no very serious handicap to its study as a developed system of law and to forming judgment on its merits and demerits as such. For there is no reasonable doubt that such a book for instance as Vijnanesvara's Mitakshara contains a fairly full and accurate exposition of Hindu Law in its period of maturity. And it is to the Mitakshara and to the other commentaries that we must go for a knowledge of Hindu Law. It is as hopeless to try to acquire a real knowledge of that law from a study of the bare Smriti texts as would be the attempt to master the present system of law of a country from its codes and statutes alone. For not only did these commentaries carry on the development of Hindu Law after the close of the Samhita period (by which I must not be taken to imply that the latest Smriti Samhitas were earlier than the earliest commentaries), but what is of greater moment they contain the traditional interpretation of the Smriti texts. These texts were really codifications, composed mostly for consolidating and to only a small extent for amending what were at the time more or less well-established rules of law. The commentators have doubtless on occasions stretched and twisted the texts, have taken them out of their contexts and have put meanings into them which they were never intended to convey. For when they had to develop new laws or to amend old laws, this forced interpretation was the method. But these are exceptions. Ordinarily the commentaries may be safely relied on as preserving the originally intended meaning of the texts, and

without their help it is not possible to realise the full import of those texts. To those who are dubious of fruitful study of Hindu Law on these imperfect materials I would point out that the vast and meticulous modern European scholarship on Roman Law is not based on any fuller materials. The writings of those who built up the Roman system of law, the classical jurists of the first four centuries of the Christian era, have practically all perished. The compilations of Justinian and the Institutes of Gaius, the latter luckily discovered only at the beginning of last century, are the mainstay of that scholarship. And no one competent to form an opinion will say that these preserve with greater fulness and more faithfully the maturity of Roman Law than the extant Smritis and commentaries the mature Hindu Law.

Yet in face of all these materials serious study of Hindu Law has been neglected by students both of ancient Hindu civilisation and of comparative law. The former have been generally satisfied with a nodding acquaintance with the Smriti texts without the trouble of going through the commentaries, and as a result their knowledge of Hindu Law is neither deep nor wide enough for any serious use. And if the whole truth has to be told lack of any legal training makes most of them incapable of fully appreciating and properly appraising the juristic ideas and legal devices they come across. Professed students of law on the contrary have to go to the commentaries. But two circumstances conspire to confine their attention almost exclusively to one portion of Hindu Law, viz., family law and the law of inheritance. This portion of Hindu Law is still living law and is administered in British Indian Courts. It is also in this portion of Hindu Law that lie embedded some of the earliest institutions and ideas of ancient Indo Aryans which are of supreme interest to students of Historical Jurisprudence and Sociology. And the interest which has led students of law to the Hindu Law has been for the most part either practical or historical. The practical lawyer and the historical researcher have between them ousted the theoretical jurist, and by far the greater portion of Hindu Law lies practically unknown. But one may assure genuine students of law, those who know to look upon past endeavours of humanity not merely as process but also as fulfilment, that here a rich harvest awaits competent reapers.

One superstition about Hindu Law, which may discourage its study, requires demolition. This is the theory that Hindu Law did not develop beyond the stage, said to be an invariable early one in the evolution of all systems of law, when legal rules

proper are not yet distinguished from religious and moral injunctions. This fiction was started on its effective career by Sir Henry Maine in the sixties of the last century in his *Ancient Law*. The book was the first work in the English language on Historical Jurisprudence and is reputed to be still the foremost in the field. But scientific interest is not the only motive which seems to have moved its author. Under the garb of scientific inquiry it is a propaganda pamphlet of European superiority of a most insidious type. Progress, says this Anglo-Saxon jurist, is an exception in the history of human races. It is practically confined to the peoples of Western Europe. With other peoples, for instance the Orientals, stagnation is the rule. In arts and institutions of civilisation they develop up to a certain stage and then stagnate or deteriorate. It is only in West Europe that progress and desire for progress are indefinite and limitless. Apparently with this historian of legal institutions history of humanity began with the fifteenth and closed with the sixth decade of nineteenth century of the Christian era! Of this generalisation, which no doubt is meant to be the scientific basis and moral justification of west European domination of the earth, Maine gives Hindu Law as an illustration. The law of this oriental people, he asserts, did not succeed in differentiating itself from moral and religious rules, and, quite in keeping with his theory, stagnated at this semi-primitive stage of amorphous homogeneity. On what facts about Hindu Law and on what knowledge of that law is this assertion made? Maine did not condescend to mention any facts, and as to his knowledge of Hindu Law I am told in a letter by Sir Frederick Pollock, who calls Maine his 'guru' and as editor and annotator of *Ancient Law* ought to know, that "at the time when he wrote *Ancient Law* it was much more remarkable that he should have heard of the Dharmasastras at all than that he should make or rather follow mistakes about them". But what seems to be remarkable is the cool assurance with which a professed votary of scientific study of law speaks and theorises on a system of law of which he has cared to know little beyond the names of some of the works in which that law is contained. Clearly in dealing with an oriental civilisation this European scholar did not feel any very strenuous call on the honesty of his scholarship. One cannot, it seems, be imperial in politics without being superficial in culture. 'Blessed are the meek, for they shall inherit the earth' is true not only of spiritual kingdom but also of the kingdom of science and scholarship.

But I suspect that Maine knew something more than the names

of the Dharmasastras. He doubtless knew of Sir William Jones' translation of the Manu Samhita and in all probability passed his eyes over some of its pages. And what a medley! Mythical cosmogony, duties of the student, of the householder and of the ascetic, rules of etiquette, of purification and penance, injunctions moral and ceremonial as to the minutest details of every day life, and side by side rules of Austinian positive law! And Maine was told that this book was a code of Hindu Law. Contrasting this code with other codes of law known to him, the Pandects or the Code Napoleon, how could he entertain any doubt that Hindu Law failed to reach the stage at which positive law is clearly distinguished from morality and religion? I am sure Maine did not take the trouble of reading Jones' translation of Manu from cover to cover. For any one of ordinary intelligence who does this cannot fail to notice that though Manu's code treats of various matters other than positive law the latter is in no way mixed up with them. It is a logically distinct subject treated of in some three separate chapters though also logically connected with the rest. And the nature of positive law is realised with absolute positiveness. It is the sum total of the rules according to which disputes between subjects are settled in the King's Court, "principles according to which justice is administered" as a modern English writer on Jurisprudence defines positive law. Manu's Dharmasastra treats of moral, religious, social and legal rules but never confuses one kind of rules with another. The difference between these various kinds of rules is realised as clearly as, say in Austin's Province of Jurisprudence Determined, and their relation and inter-dependence in concrete life with infinitely greater clearness than Austin ever realised. Manu's Dharmasastra is not a code of Hindu Law as the French or the German Code is a Code of French or German Law, but it is a treatise of which such a code of Hindu Law forms a part. Maine was unconscious of the difference and was misled.

What then is a Dharmasastra, or rather what is Dharma of which the Dharmasastra is the treatise or code? For a reply we shall not have to theorise about a possible synthetic principle which might have been subconsciously working in the minds of the composers of the Dharmasastras and led them to unite in one treatise topics which to some appear so very disparate. For the ancient Hindu writers were quite conscious of this unifying principle. For instance, Medhatithi, the earliest commentator of the Manu Samhita known to us, explains that the term Dharma

means 'duty' (1) ; it is 'used to indicate the injunctions and prohibitions as to what ought to be done and what ought to be refrained from' (2) 'Dharma' thus means 'duty' in general, duties of all kinds—domestic, social, political, juristic and religious. The thread of unity which binds together in one code these varied duties is of course the greatest if not the only principle of union we know, viz. the synthetic unity of human personality. Social, religious and juristic rules must not be confused with each other, but their unity must not also be overlooked. They are rules of action for the same human person in his different relations, the threads of which do not avoid each other but twine and intertwine to form the texture of civilised human life. The writers of the Dharmasastras saw the difference as well as the unity of these rules. If any moderns fail to appreciate their viewpoint they are either ignorant of the differentiation made or oblivious of the unity realised in the Dharmasastras.

The Dharmasastra which goes by the name of Yājñavalkya Smṛiti makes a threefold division of the topics of discussion and divides the code into three corresponding books or Adhyayas, viz., Achara, Vyavahara and Prayaschitta. The First Book on Achara deals with rules of domestic and social life, elaborated on a basis of conception of society as consisting of four classes of men with different functions and of life as divided into four periods of different activity. Education, marriage, domestic life and life ultra domestic, when family ties are snapped and social bonds are loosened to let man be free and alone with his spirit, are here dealt with. The domestic and social relations however, just as with the ancient Greeks and Romans, are not confined to living men alone. They extend to the dead ancestors and to the gods and other spirits. Appropriate observances and rituals following from these relations are accordingly laid down. The last section of this Book deals with 'kingly duties' (राजधर्मः) and is a chapter on statecraft and administrative law. The reason why such a subject is tagged on to the Book on Achara the commentators explain by saying that the king is a particular kind of householder viz. an anointed householder, and it is appropriate that after laying down the duties of householders in general the particular duties of this special kind of house-

(1) "धर्मशब्दः कर्तव्यतावचनः" : \ II, I.

(2) "धर्मशब्दः कर्तव्याकर्तव्ययोर्विधिप्रतिषेधयोः.....इष्टप्रयोगः" : I . 2.

holder should also be stated (3). The explanation seems a laboured one, but its significance we shall discuss later on. The section leads naturally to the Second Book on Vyavahara. It deals exclusively with positive law, law in strict juristic sense, both substantive and procedural. The term Vyavahara means litigation or legal dispute. As the Mitakshara explains, "Vyavahara is the claim made by one for himself in opposition to the claim of another, as for example when someone asserts, 'this corn field is mine', and another also asserts in opposition to him 'it is mine'" (4) or as the Yajnavalkya Smriti itself says, "The application by a person to the King, being overpowered by another in ways against law and custom, forms the subject matter of Vyavahara" (5). The term was also used in the more general sense of juristic act, legal transaction, act in the law. Thus when Manu provides that 'an owner shall not set aside a transaction by one under his power or potestas for the necessity of the family, in the owner's absence,' the term used for the validated legal transaction is Vyavahara (6). Or in the text of Narada (7), "up to the eighth year a person is a 'sisu' and is to be conceived as similar to one still in the mother's womb, then till the sixteenth year he is a 'Bala' also called 'Pauganda,' beyond that age he is one who has attained legal capacity (व्यवहारज्ञः) and he becomes sui juris on the death

(3) "साधारणान् गृहस्थधर्मान् कुदानौ राज्यभिषेकादिगुणयुक्तस्य गृहस्थस्य विशेषधर्मानाह" । (Mitakshara I, 308). Compare Aparaka "उक्ता वर्णधर्माः ब्रह्मचारी गृहस्थधर्माश्च इदानीं राज्ञी गृहस्थस्यापि गुणवतः जनपदपरिपालनादिधर्मानि वक्तुं ये गुणैर्युक्ताः प्रजापालनयोग्यौ भवति तान् तावदाह ।"

(The duties of the different castes as well as of students and householders have been stated. Now for the purposes of describing also the duties of the householder, endowed with the quality of sovereignty, like protection of the country the qualities which make him fit for protecting the subjects are being stated.)

(4) अन्यविरोधेन स्वात्मसम्बन्धितया कथनं व्यवहारः यथा कश्चिदिदं चेवादि मदीयमिति कथयति अन्योऽपि तद्विरोधेन मदीयमिति । (Mitakshara, II, 1).

(5) कृत्याचारव्यपेतेन भागवशाधर्षितः परैः

अविद्वत्त चेद्राज्ञे व्यवहारपदं हि तत् ॥ (Yajnavalkya II, 5)

(6) कृतुं स्वाधेऽध्यधीनोऽपि व्यवहारं यमाचरेत् ।

स्वदेशे वा विदेशे वा तं स्वामी न विचालयेत् ॥ (Manu VIII, 167).

(7) गर्भस्थैः सदृशो ज्ञेय आष्टमाद्वर्षाच्छिशुः ।

बालमाधोऽष्टमाद्वर्षात् पौगण्ड्येति शब्दादि ।

परतो व्यवहारज्ञः स्वतन्त्रः पितराहते ॥

My learned readers will no doubt note the parallelism with infans, impubes, pubes and sui juris of the Roman Law, and it is closer than appears at first sight when we remember that Hindu Law counts age not from birth but from conception.

of his parents," the context shows that 'Vyavaharagrah' denotes one capable of legal act. And the terms praptavyavahara (प्राप्तव्यवहारः) and apraptavyavahara (अप्राप्तव्यवहारः) are quite common in the commentaries denoting age of legal capacity and non-age respectively. In this Book therefore no act or conduct is discussed, which has no legal consequences, and no rules are laid down which are only moral or religious. In fact even law is here conceived from the extremely practical point of view of law courts. The king must decide disputes between his subjects. What then are the different kinds of disputes and what are the principles and rules for deciding on each kind of dispute? This is the background for discussion on law in the Dharmasastras, and this is how the so-called eighteen heads of litigation or rather subjects of legal disputes (अष्टादश विवादपदानि) are introduced as a convenient classification for giving a statement of law in its various branches. We must resist the natural temptation of calling these 'heads' or 'subjects' 'forms of action' (8). For no peculiarity of procedural form distinguishes one head from another. The principle of division is not form of procedure but variety of legal relations. Hindu Law in the Dharmasastras has long passed the stage when "substantive law is secreted through the interstices of procedure." They present us with a body of developed and systematised law with the distinction between substantive law and procedure, the latter styled by the commentators Vyavaharamatrika, fully realised and sharply defined. The third book on Prayaschitta deals with purification and penance. Of the five sections which constitute the Book the first four logically belong to the book on Achara. The first section lays down rules for funeral and after-death rites and rituals as also for purification from impurity by births and deaths of relations. The second section gives exceptions to the general rules regulating life and conduct in circumstances of difficulty. The next two sections deal with life in its last two of four periods. It is the last section which deals with the proper subject matter of the Book, viz., penance. The concept of penance the Hindus had in common with the ancient Greeks and Romans. It is deduced from the idea of survival after bodily death and from recognition of relations with powers which are supra-mundane. A conduct consequently produces consequences which affect not only this life and its relations but also life beyond death and relations which are supra-human. When conduct therefore prejudicially affects this latter life and these

(8) Sastri Golap Chandra Sarkar in his Treatise on Hindu Law actually calls them so. See Fifth Edition, p. 12.

latter relations how can the evil effects be got rid of? The answer is an elaborate code of penance for various kinds of conduct attracting different degrees of guilt. The theory on which it works is in words of Medhatithi "that a lesser degree of pain voluntarily suffered here and now is calculated to avoid far greater pain hereafter consequent on guilty conduct; just as," says the commentator, "pain of bitter medicine and of low diet avoids the pain of disease; or just as a person receives only half the punishment who himself notifies to the king his own violation of any law" (9).

(To be continued).

Atul Chandra Gupta.

(9) चक्षुःन तादात्मिकेन दुःखेनागन्निनः सम्भाव्यमानस्य महती दुःखस्य निवृत्तिरुक्तैव यथा व्याधिक्षिप्तकटु कौषधदानलघ्वाहारादिना । यथा व्यतिक्रमं कृत्वा कञ्चित् स्वयमागत्य राजनिवेदनं करोत्येवं कस्याप्यीति सोऽर्जुनदण्डभाग् भवति । (Medhatithi—commentary on Mānu XI, 46.)

REVIEWS.

Recent Developments in International Law by James Wilford Garner, Ph. D., LL. D., Professor of Political Science in the University of Illinois. Published by the University of Calcutta, 1925.

This book consists of the fifteen lectures delivered by Professor Garner in the cold weather of 1922 as the Tagore Law Professor of the year. Within a comparatively moderate compass the book is a storehouse of information relating to facts and happenings in the domain of International Law during the present century, and the last years of the nineteenth century. But we are constrained to say that these "facts" have not always been successfully co-ordinated from the point of view of any general theories or principles, and in places the book very nearly runs the risk of degenerating into a catalogue, which is made all the more distressing by the absence of any marginal index. After the introductory first lecture, Lectures II and III give an account respectively of the Hague Conventions of 1899 and 1907, and of the Declaration of London, 1908. The Fourth Lecture on

the "Development of International Aerial Law" is one of the best in the book, perhaps because being an altogether new subject, Prof. Garner was free from the entanglement of multiplicity of "facts." The next two lectures show the International Law of War in actual application in several wars of the present century before the Great War of 1914, and Lectures VII and VIII perform the same task with respect to the Great War; and Professor Garner has performed his task with notable broad-mindedness and juristic impartiality. The remaining lectures deal with the ideal and instruments of international peace and justice which have taken shape in the formation of the League of Nations, and questions and problems relating to the League. As is to be expected from a professed student, Prof. Garner takes a hopeful view of the future of International Law and predicts that "more and more there will be a shifting of emphasis from the rights of states to duties; from individual to collective responsibility; from national sovereignty to international control; from independence to inter-dependence and ultimately the law governing the relations of states will tend to become less and less international and more and more supernational" (p. 818). To this consummation there seem to be two impediments, according to Prof. Garner, viz. the theory of absolute sovereignty of states, and the theory of absolute equality of states. "The truth is, those who oppose any international organization which limits the sovereignty of states have a misconception of the real character of sovereignty. The sovereignty of a state in any true and reasonable sense of the term means nothing more than the full power of control over all persons and things subject to its jurisdiction. To say that it includes absolute and unlimited freedom of action in respect to other states is to pervert and distort the true conception. In short, sovereignty is an internal and not an external power" (p. 644). We assent enthusiastically. Regarding the theory of the absolute equality of states, 'the inventor of the "naturalist" successors of Grotius,' Prof. Garner agrees with those who think that this fiction has wrecked and will continue to wreck, unless done away with, all attempts at a concert of nations. Primacy of great powers, says he, is a fact, and it is impossible to build up any effective international organization on the basis of equal voice for all states, great or insignificant. That is to say, effective international control is to be brought about by making the great powers supreme. The irreverent will perhaps say that that is the way to bring International Law into conformity with the view of 'justice' put by Plato in the mouth of sophist Thrasymachus that justice is the interest of the stronger.

Prof. Garner does not seem to have considered sufficiently that international peace and international justice may not be the same thing. And of course he is not troubled by the thought that more than half the inhabitants of the earth are not really within the pale of international law. As an optimistic prop against the manifestly disheartening facts of international relationship Prof. Garner advises, like some others, cultivation of a 'long view.' As Mr. Keynes says in a recent tract 'too long a view' in human affairs is always useless, for 'in the long run' we are all dead. It is the discussion of the near future which only is profitable, for on that alone the present throws effective light. Prof. Garner's calculations and hopes are all based on the continuance of the present political supremacy of the Christian white nations of the earth. On that basis a 'near view' only is possible and politic. For who can guarantee the distant future? What imperial Roman Statesman conceived the possibility of the present world of nations?

The book is dedicated to the late Sir Asutosh Mookerjee who, we remember, was present during the delivery of many of these lectures in his long 'China' Coat and white shawl.

The Law of Specific Relief in British India by S M. Lahiri, M. A., B. L., Published by the Eastern Law House, 15 College Square, Calcutta, 1925 : pp. 524. Price Rs. 6.

The Eastern Law House is to be congratulated on the publication of this cheap and handy commentary on the important and difficult subject of Specific Relief. This book has no presumption to approach the classic works of Sir Edward Fry or Dr. Banerjee. But it presents to the busy legal practitioner a carefully prepared treatise which, in our opinion, is not merely up-to-date, but also well arranged in the presentation of its materials. The most recent cases have been considered and the recent Privy Council decision of *Graham v. Krishna Chandra* (52 Cal. 335) has been commented and the legal principles expounded.

It has always been a matter of regret that the learned commentators of the Indian Contract Act, by Sir Frederick Pollock and Mr. Justice Mulla have relegated a somewhat subsidiary position to the Specific Relief Act. In reviewing the latest edition of that work, a competent legal critic has requested Sir Frederick and Mr. Mulla to take out their somewhat incomplete commentary on the Specific Relief Act and to bring out a full and complete work on the subject by itself. Till this request is complied with Mr. Lahiri's work will be of service to the profession. We only wish that a greater

discrimination was shown in the consideration of the decision from the unauthorised law reports, which, as Mr. Justice Mulla has pointed out, has added considerably to the difficulties of commentators. Another observation we wish to make is that greater attention be paid to English cases which do not necessarily affect Indian decision but are extremely valuable for the elucidation of general principles of the fundamental doctrines of Specific Relief.

• **Commentaries on the Usurious Loans Act (X of 1918)**
with a complete exposition of the Law of Interest in British India.
By P. Ramanatha Aiyar, B.A., B.L., Madras ; Madras Law Journal Office, Second Edition, 1925.

• Mr. Ramanatha Aiyar has established his reputation as a commentator of law books and this book like his other works shows the same patient research, methodical treatment and anxious desire to help the reader that characterises all his works. The work has grown, in the second edition, out of a commentary on the Usurious Loans Act into an exhaustive treatment of the entire Law of Interest. In his introductory chapter the author deals with the history of interest in all ages, beginning from the earliest stages of human society down to the Usurious Loans Act. The rapid survey of this entire history in only a few pages of print naturally gives the work a scappy character and it is to be feared that in drawing his conclusions Mr. Aiyar has often been misled by taking his facts at second hand from text books on ancient law rather than from original sources. Maine, for instance, whom he quotes too often for authority, is hardly a reliable authority at this date when legal antiquities and anthropological jurisprudence have proceeded very much further than where Maine left them. Mr. Aiyar's treatment of Hindu Law texts in this connection belongs to the usual type. All the texts are mixed up and dealt with together without any attempt to determine their historical place and sequence. The author's treatment of the economic and sociological value of restraints on interest too are hardly likely to appeal to earnest students of economics. He takes up the usual slogan of "down with usury" and dismisses Bentham's arguments against Usury Laws as merely past history. Yet one would think that those arguments would still be found worthy of the most careful consideration. Mr. Aiyar regrets that all these years from 1918 when the new Act was passed have not taken us anywhere near the millenium dreamed of by the sponsors of the Act. The fault he places largely on Courts, which he thinks, have failed to appreciate the spirit

of the Act. This is partially true. But Mr. Aiyar fails to appreciate the position that the lack of progress is in no small measure due to the fact that the rate of interest is not an isolated fact in society which can be dealt with at pleasure by the Courts or Legislature without taking into account the entire complex economic structure of society. High rate of interest is no doubt an evil, but the real remedy for it lies in replacing the present system of credit by a more socialised credit organisation such as is represented by co-operative Credit Societies. Without such constructive effort a vigorous destructive propaganda by cutting down the contracted rate of interest except in clear cases of coercion or undue influence may have the effect of shutting out the poorer classes from the only available form of credit and thus work for their ruin. This is a view point which was not adequately taken account of by the Legislature in 1918. It is not surprising therefore that the Act has proved infructuous. One should never forget that it is only a very small fraction of the loan transactions which ever come before the Courts and in fact, the only class of people who are likely to benefit by the law are dishonest debtors who do not want to pay. The comparative failure of the Act shows that Courts dealing with facts have shown a more adequate appreciation of realities than the Legislature.

The notes of the author enriched by copious references to English decisions are valuable.

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THE SPIRIT OF HINDU LAW.

(Continued.)

This scheme of Yajnavalkya Smriti of tripartite division of topics is the common scheme, more or less apparent, of all complete codes of Dharmasastra. Of the twelve chapters of the Manusmriti the first six chapters, the tenth, and a small portion of the ninth deal with Achara, and correspond to the First Book and the first four sections of the Third Book of Yajnavalkya with the exception that to the subject matter of the last section of Yajnavalkya's First Book, viz. 'Kingly duties,' Manusmriti devotes a separate chapter, the seventh. Manu's eighth and ninth chapters deal with positive law and correspond to Yajnavalkya's Second Book on Vyavahara. The eleventh chapter is on penance, the subject matter of Yajnavalkya's last Book i. e. of its last and longest section. Manu's twelfth chapter treats of the relationship of the duties treated of in the Dharmasastras with the final objective of man, illumination and liberation, a subject not dealt with in the more practical Yajnavalkya Smriti. I have spoken of a complete code of Dharmasastra for some Smritisamhitas do not deal with all the three subjects of Achara, Vyavahara and Prayaschitta but confine themselves to one or two of them only. Many appear to have been books only on Achara and Prayaschitta, and it is of interest to note that the well-known Narada Smriti on the other hand deals exclusively with Vyavahara or positive law altogether omitting Achara and Prayaschitta.

It is perhaps unnecessary now to repeat that one would only be misled by seeking Hindu Law everywhere in the Dharmasastras. It is to be found only in one part of those treatises viz. the part dealing with Vyavahara, excepting the law relating to those relationships whose social aspect is of more importance than the legal, e. g. marriage, which naturally forms a part of the Achara portion of the Dharmasastras. But it does not seem that obvious consequences of this rather evident fact are always kept in mind. And the result is a good deal of confusion of ideas in matters of Hindu Law even in quarters where it is to be least expected. One such confusion relates to the subject of the sources of Hindu Law. Modern

text books of Hindu Law agree in telling us that these sources according to Hindu theory are enumerated in the text of Manu which says that "the Veda, the Smṛiti, the usage of the good and what is agreeable to one's own soul have been said to be the four-fold direct proofs of Dharma" (10), or in the variant text of Yajñavalkya which adds to Manu's four a fifth source, viz. "desire born of due deliberation" (11). Now obviously neither 'what is agreeable to one's own soul' nor 'desire born of due deliberation,' whatever they may mean, can be conceived as a source of positive law. And when we, as we must, give up the ignorant supposition that Hindu Law did not distinguish between ethico-religious and legal duties, the only way to treat these texts as enumeration of sources of law is by taking them as enumerating generally sources of all kinds of duties, legal as well as social, moral and religious, that is to say of 'Dharma' in general—of 'Vyavahara Dharma' as well as of Achāra and Prayaschitta Dharmas, so that each of these sources is not necessarily a source of all kinds of Dharma, but some may be sources exclusively of one or two kinds of Dharma only. And we may say that though the Veda, the Smṛiti and the usage of the good are sources of Law (Vyavahara) as well as of other duties, 'soul's agreeableness' and 'deliberate desire' are sources of Achāra and Prayaschitta only but not of law or Vyavahara. But even this modified view of these texts as enumeration of sources of positive law seems to me to be incorrect. For the fact is that these texts were not really meant to be enumeration of the sources of Vyavahara or positive law, but only of Achāra which in a broad sense includes Prayaschitta also. The text of Manu quoted above is merely a repetition of an earlier text which says, 'the entire Veda is the source or proof of Dharma, also the memory of persons versed in the Veda and concentrated on it, as also the usage and the self-satisfaction of the good (and learned in the Veda)' (12). The repetition was for indicating according to some commentators, the close of a section, viz. that on sources of Dharma, in pursuance to the

(10) वेदः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः ।

एतच्चतुर्विधं प्राहुः साक्षाद्भगवत्स लक्षणम् ॥ (Manu II, 12).

(11) श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः ।

सस्यक् सङ्कल्पनः कामो धर्मः सूत्रं मिदं श्रुतम् ॥ (Yajñavalkya I, 7).

(12) "वेदोऽखिलो धर्मः सूत्रं श्रुतिर्गोली च तद्विदाम् ।

आचारश्चैव साधुनामात्मानस्तुष्टिरेव च ॥" (Manu II, 6).

usual practice of writers in this respect (13). However that may be one thing is certain. According to the traditional interpretation of these texts, and as the last quoted which is also the principal text of Manu in the matter, clearly indicates the various sources there enumerated are ultimately reducible to one, viz. the Veda. As Medhatithi says, "As a matter of fact there is only one proof of Dharma, viz. that called Veda. The Smriti and the others are merely its different forms" (14). And Visvarupa opens his commentary on the text of Yajnavalkya quoted above by saying "If it be maintained that the Smriti and the others are proofs of Dharma independent of the Vedas, they themselves would lack a basis..... Their authority as proofs really rests on the Veda" (15). According to this theory the Smritis or the Dharmasastras constitute a source of Dharma only because their authors were, as known from tradition, eminently versed in the Vedas and it is therefore reasonable to conclude that duties, mandatory and prohibitory which they enjoin they found in the Vedas either in texts now lost or in passages scattered in different parts of the Vedas whose combined effect is not discernable to men of lesser intellect or of less extensive reading. The 'Sat' or the 'Sadhu'—the good—whose practice is a source of Dharma is not merely the ethically 'good' but he must also know the vedic lore and practice its teachings (16). And his practice is a source of Dharma for the same reason as the Smriti is. What such men practise as Dharma may safely be inferred as resting on the Vedas even if there be no direct Sruti or Smriti texts

(13) "अन्ये तु उपसंहारार्थमिदं श्लोकं व्याचक्षते। समाप्तं धर्मलक्षणं प्रकरेण निति पुनः पाठः समाधिं सूचयति.....। प्रायेण चेवायम्य कारणा रीतिः।" (Medhatithi II, 12). Others take this shloka as introduced for the purpose of (indicating) the conclusion, that is to say, the section on sources of Dharma is concluded. The repetition indicates the conclusion. This is almost always a method amongst authors.

(14) एकमेव धर्मो प्रमाणं वेदाख्यं तस्यैवेति भेदाः श्रुत्यादयः (II, 12).

(15) यदि हि श्रुत्यादयो वेदानपेक्षा धर्मं सूत्रमित्युच्येत तदा निर्मुक्ततास्यात्।.....

वेद पूर्वकतया चेवां प्रमाणम्। (I, 7).

(16) वेदाविदोऽनुष्ठातारश्च सन्धः। (Visvarupa I, 7). Compare the definition of शिष्टः quoted in Apararka:

"धर्मोऽधिगती दैव्य वेदः सपरिहृणः।

शिष्टासदनुमानज्ञाः श्रुति प्रत्यक्ष इतिवः॥"

adducible in their support (17). 'Self-satisfaction' which is a source of Dharma is not anybody's self-satisfaction in every matter. It is the 'self-satisfaction' of the good who are learned in the Vedas. For it may be inferred that nothing, which is not Dharma can satisfy the soul of such persons (18). Or, according to the usual interpretation of this source, 'self-satisfaction' is the determinant where alternative courses are prescribed in the Sruti or in the Smriti (19).

But if it is certain that according to ancient Hindu theory all other 'sources' of Dharma enumerated in these texts rest ultimately on the authority of the Veda it is also equally certain that according to that theory positive law or Vyavahara or at least a good portion of it has not the Veda as its source or authority. To appreciate this point fully one must understand the theory of the limits of the authority of the Veda in the sphere of human activity. That theory is that Veda is not authority in all spheres of human acts. When an end is desirable and it is knowable from experience and logical reasoning what acts lead to that end the Veda is no authority for those acts. For its authority is limited to acts between which and their described consequences no empirical or logical relationship can be discerned. It is only in that supermundane and supra-rational sphere that the authority of the Veda prevails for there no other source of knowledge is possible but the authority of the Vedas. The great Medhatithi would read this theory into the very derivation of the term Veda. "We proceed to explain the etymology of the word Veda. The Veda is so-called for men know from it the desirable and called Dharma which is not knowable from any other source of knowledge" (20). And I cannot do better than transcribe Medhatithi's summary of this theory of the proper sphere of vedic authority. The commentator

(17) यत् शुति श्रुति वाक्यानि न सन्ति शिष्टाश्च धर्मं बुद्ध्यानुतिष्ठन्ति तदपि वेदिकमेव पूर्व्ववत् प्रतिपत्तव्यम् । (Medhatithi II, 6).

(18) आत्मनस्तुष्टिरेव च धर्ममूलमित्यनुषङ्गाने वेदविदां साधनमिति च ।

.....नैव तेषामधर्म आत्मपरित्यज्यति । (Medhatithi II, 6).

(19) ब्रह्म भवन्तश्चाहुः ये वैकल्पिकाः पदार्थास्तेषु यस्मिन् पक्षे मनः प्रसीदति सपक्ष आश्रयितव्यः । (Medhatithi II, 6). cf. Visvarupa "वैकल्पिकयोरेकतया वधारणम् ।"

(20) व्युत्पाद्यते च वेदशब्दः । विदन्त्यामन्य प्रमाणं वेदं धर्मलक्षणमर्थमव्यादिति वेदः । (Medhatithi, II, 6).

writes(21), "This Veda is a well-ascertained definite series of words not due to any human authorship called by the name of 'Mantra-Brahmana' and divided into many recensions. It is the root of Dharma—the term 'root' meaning the cause or the means of knowledge. The Veda and the Smriti constitute such 'root' by making known what is Dharma and not as the cause or support of Dharma like the root of a tree. The term Dharma has been explained before. It is that which a man should do as conducive to his good but in a way not cognisable by perception and other ordinary means of knowledge. Agriculture, service and the like are also conducive to one's good, but the way in which they are so is known from induction by methods of agreement and difference. And the methods of cultivation which produce a good harvest are also known from perception and other ordinary means of knowledge. But that sacrifices are conducive to one's good and the manner in which they become so by the intervention of supra-sensible effect produced called 'Apurva' are not knowable by perception or other means of knowledge..... such Dharma has to be known from the mandatory precepts of the Brahmana and sometimes from the Mantras also." And this theory is also clearly indicated in Medhatithi's reply to the objection that the assertion of the Veda as source of Dharma in Manu's text is useless. For the proof that it is source of Dharma can never rest on the authority of any texts as the latter will be in need of further authority. That proof must be in a reasoning not depending on the authority of the vedic or smriti texts. Medhatithi admits the validity of the view that texts could not prove the Veda as source of Dharma, but that it is proved by reasoning independent of texts. But he replies that Manu's text is only meant for those who are not able to follow the difficult process of reasoning involved, but have to rely on those who can and who have satisfied themselves that that reasoning is valid. "Just as," writes the commentator,

(21) स. वैदो विशिष्टः शब्दराशिरपीरुवेयो मन्त्रम् । आख्यायितुं कशाखामेदभिधौ । धर्मस्य मूलं । प्राभाष्यपरिज्ञाने हेतुः कारणं मूलं । तच्च वेदख्यो धर्मः प्रतिज्ञापकं तथैव न । निवर्तकतया न च स्थितिहेतुतया वचस्तेव । धर्मशब्दश्च प्राग्वाक्यातः । यत्पुरुषस्य कर्मस्य प्रत्यक्षाद्यवगम्यविलक्षणस्वभावेन । श्रेयः साधनं कृषिं सेवादिं भवति पुरुषस्य कर्मस्य त्वस्य च तत् साधनं स्वभावोऽन्वयव्यतिरेकाभ्यामवगम्यते । यादृशेन व्यापारेण कृष्यादिर्लोकादिं सिद्धिः सापि त्वचाद्यव गम्यैव । यांगद्विस्तु साधनत्वं येन च रूपेणापूर्वोक्तिविषयवधानादिना नूनं प्रत्यक्षाद्यवगम्यम् ।

अथ धर्मो माह्वान वाक्ये भ्योऽवगम्यते लिङादियुक्तोऽयं क्वचित् मन्त्रे भ्योऽपि । II, 6.

"in ordinary worldly matters there are teachers who dogmatically teach results capable of being established by other proofs. (Thus the physician teaches) 'do not eat till the last meal is digested; indigestion causes diseases.' It can not be validly objected that those who are not able to comprehend that Veda is the source of Dharma by following the line of reasoning which establishes it will not be satisfied from texts either. For it is a matter of experience: that there are men who accept without argument words of those who are famous as authorities. Therefore this matter of the source of Dharma rests on the authority of reason and not on the authority of the Veda" (22). And Medhatithi concludes with a remark most important for our purposes, "There are other matters also, e. g. the *Smriti* dealing with *Vyavahara* or positive law which rest on reason (and not on the Veda), as we shall show on relevant occasions" (23). This clear statement of Medhatithi leaves no room for doubt that even in theory the ancient Hindu writers did not conceive positive law to rest on the authority of the Veda. The source of positive law is experience and logic and not the Veda, it is 'Nayamula' (न्यायमूल) and not 'Vedamula' (वेदमूल). According to ancient Hindu theory the Veda is the ultimate root of what Christian Europe calls 'religion' and thus in that theory positive law is non-religious. It is a part of Dharma in the broad sense of duty, but it is separate from the 'religious' portion of Dharma.

(To be Continued).

Atul Chandra Gupta.

(22) भवन्ति च लोके प्रमाणान्तरसिद्धानामर्थानामुपदेष्टारः । न त्वया जीये भोक्तव्यमजीये प्रमणादि रोगाः । न चेतद्वक्तव्यम् ये न्यायतो वेदस्य धर्ममूलत्वं न शक्तु वन्ति प्रतिपत्तु ते वचनादपि न प्रत्येव्यन्ति । यतो दृश्यते य आसत्त्वेन असिद्धास्तदोयं वृचनमविचार्यैव केचन प्रमायेवन्ति । तदेव सर्व्वमिदं प्रकारं न्यायमूलं न वेदमूलं ।

(23) अन्यथापि व्यवहार स्यादादी यत्र न्यायमूलता तत्र यथावसरं दर्शयिष्यामः ।

REVIEWS.

The Profession of an Accountant by Albert Crew, published by Messrs. Gee & Co. Ltd. 6 Kirby Street, London, E. C. 1, 1925.

Mr. Crew is a well known author of repute. Of a number of legal books and his latest treatise deserves hearty welcome. The book is practically divided into two sections—the Profession of an Accountant and some Notes on the Legal Profession, a somewhat curious although interesting combination. In the first part the author has dwelt upon the characteristics, the etiquette, the registration and recognition of the profession of an accountant. In the second part he has written a number of interesting chapters on certain aspects of the legal profession. In these days when the professions, specially the legal profession, are assailed by militant politicians the author has well emphasized that “the highest ideal of a profession is public service and the distinguished characteristic is its independence as evidenced by its complete self-government.” The most entertaining chapter in this small book is that on professional dinners and many anecdotes narrated therein are both interesting and instructive.

Woodroffe and Ameer Ali's Law of Evidence. Eighth Edition by Sir John Woodroffe Thacker Spink & Co., Calcutta, 1925 ; Price Rs. 28.

Woodroffe and Ameer Ali's Law of Evidence has long been a standard text-book on the subject, and a new edition of the work which has long been looked for is sure to be welcomed by the public. The work of the learned author in this new edition, so far as we have been able to examine it has been practically confined to bringing the case law down to date and furnishing an ampler bibliography. It is hardly necessary to mention that this work has been done with the meticulous care and accuracy for which Sir John Woodroffe enjoys a deserved reputation. There has been no attempt to patch up the old matter with new additions. The additions have been properly digested and entirely assimilated to the old material. The author refers to the comparative paucity of cases in recent English reports on the law of evidence and refers this to a growing sense of the inutility of many objections to the evidence. It can hardly be said that in India we have reached the same stage of development of law.

It is unfortunate that the learned author has not thought fit to revise his statement of principles in the light of recent American theories, notably with reference to the doctrine of hearsay. His criticisms of the Evidence Act are still confined to those of Mr. Whitworth. Important contributions to the thought on the whole theory of evidence have been made by authors like Wigmore and

Chamberlayne which surely deserved fuller consideration, from the point of view of the student, if not from that of the practitioner.

The Annotated Indian Succession Act. (Act XXXIX of 1925) by S. C. Sarkar. B. L. ; published by M. C. Sarkar and Sons 90-2A Harrison Road, Calcutta, 1925 ; Price Rs. 1-12.

The speedy publication of this new Act in a handy form is an immense service to the profession. The Act was published in the India Gazette on the 10th of October last and the book is out in the market just after a month. We have looked into the book carefully and we are pleased to find that unlike other editions in the market, the Comparative tables have been very carefully drawn up. Cases noted under each section are also useful. The book as a ready reference will be liked very much.

